92-606

No. 92-

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In The

Supreme Court of the United States

October Term, 1992

BURLINGTON NORTHERN RAILROAD COMPANY,

Petitioner,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, an unincorporated association, BEN OCHOA, GENERAL CHAIRMAN, E. R. SPEARS, GENERAL CHAIRMAN, PAUL S. SWANSON, GENERAL CHAIRMAN, and BRUCE G. GLOVER, GENERAL CHAIRMAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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October 7, 1992

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QUESTION PRESENTED FOR REVIEW

WHERE A UNION STRIKES OVER A MINOR DISPUTE IN VIOLATION OF THE RAILWAY LABOR ACT, 45 U.S.C. §§ 152 FIRST AND 153 FIRST (i), IS THE EMPLOYER'S IMPLIED RIGHT OF ACTION ENFORCEABLE BY MONETARY REMEDIES?

PARTIES TO THE PROCEEDING BELOW AND RULE 29.1 STATEMENT

All parties to the proceeding below are identified in the caption of this petition.

Burlington Northern Inc., is the parent company of petitioner, Burlington Northern Railroad Company. The partially owned subsidiaries of petitioner Burlington Northern Railroad Company are:

The Belt Railway Company of Chicago
Burlington Northern (Manitoba) Limited
Camas Prairie Railroad Company
Davenport, Rock Island and North Western Railway Company
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Keokuk Union Depot Company
Longview Switching Company
M T Properties, Inc.
Northern Radio Ltd.
Paducah & Illinois Railroad Company
Portland Terminal Railroad Company
Terminal Railroad Association of St. Louis
Trailer Train Company
The Wichita Union Terminal Railway Company

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

LIST OF CORPORATE SUBSIDIARIES AND AFFILIATES ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. Course of Proceedings and Dispositions Below ... 4

B. Railway Labor Act Framework 6

C. Facts 7

D. Decision Below 8

REASONS FOR GRANTING THE WRIT OF CERTIORARI 9

I. The Decision Below Rests on a Precedent Whose Bases are no Longer Valid 11

II. The Decision Below Conflicts with this Court's Decisions Finding an Implied Cause of Action under the RLA to Enforce Sections 2 First and 3 First (i) 15

A. The Railway Labor Act Creates Implicit Causes of Action for Enforcement of the Act's Various Duties and Obligations 15

B. Congress has Provided Courts with Discretion to Fashion Appropriate Remedies for Violations of the Railway Labor Act 17

TABLE OF CONTENTS – Continued

Page

C. The Decision of the Court Below Limiting the Available Judicial Remedies for Violations of the RLA is Inconsistent with the Principles Enunciated by this Court Concerning Enforcement of Statutory Rights When the Statute does not Provide Specific Remedies 21

III. There are Neither Policy nor Statutory Bases for the Decision of the Court Below Which Recognized a Dual Standard Under the RLA, Whereby Unions May Obtain a Monetary Remedy From a Carrier, but a Carrier May Not Obtain Such a Remedy From a Union 23

CONCLUSION 27

LIST OF APPENDICES

Appendix A

Opinion of the United States Court of Appeals for Fifth Circuit, *Burlington Northern Railroad Company v. Brotherhood of Maintenance of Way Employees, et al.*, No. 91-1440 (5th Cir. May 22, 1992) 1a

Appendix B

Order of the United States District Court for the Northern District of Texas, Fort Worth Division, *Burlington Northern Railroad Company v. Brotherhood of Maintenance of Way Employees, et al.*, No. 4-90-463-A (N.D. Tex. March 7, 1991) 11a

Appendix C

Order denying rehearing, *Burlington Northern Railroad Company v. Brotherhood of Maintenance of Way Employees*, No. 91-1440 (5th Cir. July 9, 1992) 13a

TABLE OF CONTENTS – Continued

Page

Appendix D

Excerpts from Section 2 First of the Railway Labor Act, 45 U.S.C. § 2 First 15a

Appendix E

Excerpts from Section 3 First (i) of the Railway Labor Act, 45 U.S.C. § 153 First (i) 16a

Appendix F

Memorandum Opinion in *CSX Transportation, Inc. v. N. J. Marquar, et al.*, No. 90-399, (E.D. Ky. May 3, 1991), *appeal pending*, No. 91-5689 (6th Cir.)..... 17a

TABLE OF AUTHORITIES

Page

CASES

Bell v. Hood, 327 U.S. 678 (1946) 17

Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad, 353 U.S. 30 (1957)..... 3, 7, 10, 19

Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969), *rehearing denied*, 394 U.S. 1024 (1969)..... 15

Burlington Northern Railroad Company v. Brotherhood of Maintenance of Way Employees, 961 F.2d 86 (5th Cir. 1992)..... 2

CSX Transportation, Inc. v. Marquar, No. 90-399 (E.D.Ky. May 3, 1991), *appeal pending*, No. 91-5689 (6th Cir.)..... 12

Cannon v. University of Chicago, 441 U.S. 677 (1979) 16

Chicago & North Western Railway v. United Transportation Union, 402 U.S. 570 (1971) ..... *passim*

Consolidated Rail Corp. v. Railway Labor Executives' Association, 491 U.S. 299 (1989) 6, 7, 16, 26

Davis v. Passman, 442 U.S. 228 (1979)..... 16, 18, 21, 23

De Lima v. Bidwell, 182 U.S. 1 (1901) 20

Elgin, Joliet & E. Railway v. Burley, 325 U.S. 711 (1945), *reaff'd on reargument*, 327 U.S. 661 (1946) 6

Franklin v. Gwinnett County Public Schools, ___ U.S. ___, 112 S. Ct. 1028 (1992)..... 9, 10, 21, 22

Johnson v. Railway Express Agency, 421 U.S. 454 (1975). 14

Kendall v. United States, 37 U.S. (12 Pet.) 524 (1938) 20

TABLE OF AUTHORITIES – Continued

Page

Louisville & Nashville Railroad Company v. Brown, 252 F.2d 149 (5th Cir.), *cert. denied*, 356 U.S. 949 (1958) ..... *passim*

Machinists v. Central Airlines, 372 U.S. 682 (1963), *reh'g denied*, 373 U.S. 947 (1963) 16

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 20

National Airlines v. Airline Pilots Association International, 431 F. Supp. 53 (S.D. Fla. 1976) 12, 14

Pollard v. Bailey, 87 U.S. (20 Wall.) 520 (1874) 20

Steele v. Louisville & Nashville Railroad Company, 323 U.S. 192 (1944) 18

Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) 14

Texas & New Orleans Railroad v. Brotherhood of Railway Clerks, 281 U.S. 548 (1930) 14, 15, 17

Virginian Railway Company v. System Federation No. 40, 300 U.S. 515 (1937) 18

STATUTES

Airline Deregulation Act, Pub. L. No. 95-504, 92 Stat. 1705 (1978) 25

Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980) 25

Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1897 (1980) 25

28 U.S.C. § 1254 2

28 U.S.C. § 1331 4

TABLE OF AUTHORITIES – Continued

Page

29 U.S.C. § 151 13

42 U.S.C. § 1981 14

42 U.S.C. § 1982 14

42 U.S.C. § 1983 13

42 U.S.C. § 1985 13

42 U.S.C. § 1986 13

45 U.S.C. § 151a(1) 15

45 U.S.C. § 152 ..... *passim*

45 U.S.C. § 153 ..... *passim*

45 U.S.C. § 156 ..... 6, 23, 24

45 U.S.C. § 159 17

45 U.S.C. § 184 16

49 U.S.C. §§ 10101a(1) – 10101a(15) 25

MISCELLANEOUS

Hearings on Railroad Labor Disputes Before the House Committee on Interstate and Foreign Commerce, H.R. 7180, 69th Cong., 1st Sess., p. 40 (January 26, 1926) 20

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Burlington Northern Railroad Company ("BN") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above case on May 22, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported: *Burlington Northern Railroad Company v. Brotherhood of Maintenance of Way Employees*, 961 F.2d 86 (5th Cir. 1992), and the opinion is set forth in the Appendix ("App.") at 1a-10a. The order of the United States District Court for the Northern District of Texas is not reported. It is attached at App. 11a-12a.

JURISDICTION

The judgment and opinion sought to be reviewed was entered by the Fifth Circuit Court of Appeals on May 22, 1992. The petitioner's Suggestion for Rehearing *En Banc* was treated by the Fifth Circuit as a petition for rehearing and suggestion for rehearing *en banc*, which was denied on July 9, 1992. This order is set forth at App. 13a-14a. This Court has jurisdiction to review the judgment of the Fifth Circuit under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

a) Section 2 First of the Railway Labor Act, 45 U.S.C. § 152 First (App. 15a) states that:

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to

> commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

b) Section 3 First (i) of the Railway Labor Act, 45 U.S.C. § 153 First (i) (App. 16a), states:

> The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

STATEMENT OF THE CASE

This case concerns the nature of relief that may be awarded for violations of Sections 2 First and 3 First (i) of the Railway Labor Act ("RLA" or "the Act"), 45 U.S.C. §§ 152 First and 153 First (i). Though Congress has not expressly provided for a cause of action for violations of those sections of the RLA, this Court previously found an implied right of action under Sections 2 First and 3 First (i). *Chicago & N. W. Ry. v. United Transp. Union*, 402 U.S. 570 (1971) (*"Chicago & North Western"*); *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30 (1957)

("*Chicago River*"). Furthermore, this Court has stated that Section 2 First should be "enforceable by whatever appropriate means." *Chicago & North Western*, 402 U.S. at 578.

Notwithstanding this Court's holdings in *Chicago & North Western* and *Chicago River*, the court below held that there was no cause of action for damages to enforce violations of those two sections. 961 F.2d at 89. This case provides the opportunity for this Court to definitively state for the lower courts that the implied right of action in Sections 2 First and 3 First (i) supports a claim for relief by whatever means appropriate, including a monetary remedy. This case also provides an opportunity for this Court to address an illogical asymmetry within the lower courts: unions may be awarded the full range of relief, including damages, for a carrier's violation of its duties under the RLA, but carriers are not allowed this full range of remedies when a union violates its duties under the RLA. No sound policy or decision by this Court supports such unequal enforcement of duties under the RLA.

A. Course of Proceedings and Dispositions Below:

On June 26, 1990, at 2:30 a.m. BN obtained a temporary restraining order issued by the United States District Court for the Northern District of Texas, Fort Worth Division, against an imminent strike by the Brotherhood of Maintenance of Way Employes and the named officers ("BMWE"). The district court had jurisdiction under 28 U.S.C. § 1331 and 45 U.S.C. §§ 2 First and 3 First (i). In its complaint, BN sought full equitable relief, including preliminary and permanent injunctive relief to stop the

strike, and monetary relief for the expenses it incurred as a direct result of the unlawful strike. After a full evidentiary hearing, the district court granted BN's motion for a preliminary injunction against BMWE's strike action. The Court found that there was a substantial likelihood that the dispute between BN and BMWE was a minor dispute under the RLA. No appeal was taken by BMWE.

On January 9, 1991, BN moved for summary judgment requesting the court to award full equitable relief, including a permanent injunction against the strike and monetary relief for the expenses incurred in responding to the unlawful strike. On February 6, 1991, BMWE filed a motion to dismiss BN's claim for monetary relief. On February 14, 1991, the district court granted BN's motion for summary judgment with respect to the permanent injunctive relief, but denied BN's motion with respect to its claim for monetary recovery. On March 7, 1991, the court issued an order granting BMWE's motion to dismiss BN's claim "for damages or other monetary relief." App. 11a-12a. On March 21, 1991, the court amended the ordering paragraphs of the permanent injunction order. No appeal of any of the orders of the district court has been taken by BMWE.

BN appealed the court's order dismissing its claim for monetary relief. Because the district court found *Louisville & Nashville Railroad Company v. Brown*, 252 F.2d 149 (5th Cir.), *cert. denied*, 356 U.S. 949 (1958) (*"Brown"*), controlling, BN filed a Suggestion for Hearing En Banc. It was denied on October 29, 1991, by a panel of the Fifth Circuit. A different panel held on the merits that *"Brown* controlled the disposition of this case." 961 F.2d at 89.

On July 9, 1992, the Fifth Circuit treated BN's Suggestion for Rehearing En Banc as a petition for rehearing and suggestion for rehearing *en banc* and denied it. Within ninety days from the denial of the petition for rehearing, Petitioner has filed this petition for writ of certiorari.

B. Railway Labor Act Framework:

Congress established distinct dispute resolution mechanisms based on the nature of the dispute between the employees' representatives and the carriers. The characterization of the dispute determines the mechanism the parties are to employ in resolving the dispute. There are two types of disputes: major and minor. *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 303 (1989) ("*Conrail*"); *Elgin, Joliet & E. Ry. v. Burley*, 325 U.S. 711, 724 (1945), *reaff'd on reargument*, 327 U.S. 661 (1946). The distinction between a "major" and a "minor" dispute is crucial; it determines not only the degree to which a federal court may become involved in a dispute, but also the legality of strike conduct by the employees and their unions.

Under the RLA, the parties in a major dispute seek to create contractual rights. They are required to preserve the status quo until they have exhausted a series of non-binding settlement procedures. 45 U.S.C. § 156. After the exhaustion of those procedures, the parties to the dispute are free to use all available self-help. On the other hand, in a minor dispute, the parties seek to enforce existing contractual rights. The parties are governed by Sections 2 First, Sixth and Section 3 of the RLA which, after negotiation, compels resolution by binding arbitration of the

contractual dispute. In a minor dispute, the union is never free to resort to economic self-help measures such as strikes. *Conrail*, 491 U.S. at 303; *Chicago River*, 353 U.S. at 41-42.

C. Facts:

In the early morning hours of June 26, 1990, BMWE commenced a 24-hour work stoppage and picketing at many BN facilities over a major portion of BN's railroad. Though BN had met and exchanged correspondence with officers of BMWE over the contractual justification for contracting the clipcar, BMWE still called a strike against BN. The clipcar was a newly developed machine to install rail clips and insulators in the process of laying concrete ties. 961 F.2d at 87. BN argued that it was entitled to contract out this work under its collective bargaining agreement with BMWE (Schedule Agreement). BMWE argued, under the terms of a different collective bargaining agreement called the P811-S Agreement, that BN could not contract out this work. 961 F.2d at 87.

Instead of proceeding to compulsory arbitration under Sections 2 First, Sixth and 3 First (i) of the RLA, BMWE took a strike vote of its members. Without any warning to BN, BMWE advised its members to walk off their positions or not to report for duty at approximately 5:30 a.m. to 6:00 a.m. on June 26, 1990. (Rec. 266). BMWE employed a public relations firm to assist in its effort to publicize its work stoppage against BN. (Rec. 324, 338 [attachment A]). Shortly after the strike started, the public relations firm issued a press release stating the strike

was a "public protest." (Rec. 324, 338 [attachment A]). In a letter to media and civic leaders, BMWE stated that it had taken a "more aggressive approach" because "compromise was not working nor was arbitrating the issue. . . . " (Rec. 328). BMWE then publicized its success to its members by claiming that normal railroad operations were seriously disrupted: "We should consider this a victory!" (Rec. 235, 263).

Such striking and picketing by BMWE was found by the district court to be unlawful because it involved a minor dispute under the Railway Labor Act. The strike activity was both preliminarily and permanently enjoined. (Rec. 296, 872). BMWE did not appeal this finding.

This unlawful strike resulted in severe disruption to BN's train operations and other services. Despite the severe disruption, BN tried to operate during the strike in an attempt to fulfill its legal obligations as a common carrier. BN incurred direct expenses of approximately $100,000 as a result of BMWE's striking and picketing. These expenses represent costs incurred for lost productivity, train and switching delays, overtime wages paid to non-BMWE represented employees who were held over because of the strike, and travel expenses for exempt BN employees who had to be relocated to trouble-spots in order to facilitate operations during the strike.

D. Decision Below:

When BN sought to redress the union's violation of the RLA through a claim for monetary relief, the district court dismissed its claim and the Fifth Circuit affirmed.

The court below held, on the basis of *Brown*, that there was "no cause of action under the Railway Labor Act for damages caused by an illegal strike." 961 F.2d at 89. The court felt bound to follow *Brown* because there was no "Supreme Court decision holding that monetary relief is available for breach of the § 152 First duty." (footnote omitted) 961 F.2d at 89. In its view, neither *Franklin v. Gwinnett County Public Schools*, ___ U.S. ___, 112 S. Ct. 1028 (1992) ("*Franklin*") nor *Chicago & North Western* controlled the question as to the type of relief available to support an implied cause of action for violations of §§ 2 First and 3 First (i) of the RLA. Thus, the panel felt "bound to follow the holding in *Brown*." 961 F.2d at 89.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The question presented by this case is whether the implied right of action in Sections 2 First and 3 First (i) of the RLA supports a claim for monetary relief under the decisions of this Court. The question is important to the proper development of the appropriate remedies for violations of the RLA.

The decision below abruptly stops that development by confusing the distinction between implied causes of action and the respective appropriate remedies. At the time of enactment of the RLA, the Congressional intent was to create legal obligations under the law, while allowing the remedies to be developed on a case-by-case basis. This Court has stated that there is an implied cause of action under the RLA to address violations of Sections

2 First and 3 First (i), and has directed lower courts to enforce those violations by "whatever appropriate means." *Chicago & North Western*, 402 U.S. at 578. In its recent decision in *Franklin*, this Court reaffirmed the general rule that the federal courts have the power to award any appropriate relief in a cognizable cause of action unless Congress indicates otherwise. Unless this Court confirms that this principle applies to the implied right of action recognized in *Chicago & North Western* and *Chicago River*, the decisions of the lower courts will continue to curtail the development of the law of remedies under the RLA.

This issue is of great importance to the rail and airline industries, their employees, and the labor organizations representing those employees, all of which are governed by the RLA. Limiting the carriers to injunctive relief has not discouraged the unions from unlawfully striking over minor disputes. Thus, the unions have been free to bring economic havoc on the carrier and the public, while the air and rail carriers' only recourse is to minimize the economic destruction by racing to the courts for injunctive relief. That remedy has not deterred the employees and their unions from violating the major purpose of the RLA: avoidance of interruption to the carrier's operations and to commerce. Providing the lower courts with the full range of remedies will promote the Congressional intent that minor disputes be peacefully resolved through the compulsory arbitration mechanism in the RLA.

Moreover, denial of a damages remedy to employers – when that same remedy is available to other parties – distorts the statutory intent. The court below sanctioned such an improper asymmetry by finding that unions are

allowed to recover damages for violations of Section 6 of the RLA, but carriers are not allowed to recover damages under Sections 2 First and 3 First (i). There is no statutory authority for such a distinction.

Furthermore, the resulting dichotomy cuts against this Court's teaching in *Chicago & North Western*, that Section 2 First is the "heart" of the RLA. If the courts refuse to allow all available remedies to enforce the "heart" of the RLA, but allow such remedies to enforce other sections, then the proper administration of the RLA will falter. This writ of certiorari should be granted to clear up this confusion and stop the asymmetrical development of the law of remedies under the RLA.

I. The Decision Below Rests on a Precedent Whose Bases are no Longer Valid.

This case presents a situation in which the dispositive rule of law was established in a precedent whose doctrinal foundations have been entirely eroded. The Fifth Circuit held that its *Brown* decision controlled the disposition of this case. 961 F.2d at 89. The court gave no rationale for the continued validity of the 34-year-old decision in *Brown*, other than to say that there were no Supreme Court decisions which held that damages were available for a breach of Section 2 First. 961 F.2d at 89. The Fifth Circuit did not explain why the result in *Brown* represented a sound interpretation of the RLA, but merely reflected that in the absence of contrary precedent from this Court, "this panel is bound to follow the holding in *Brown*." 961 F.2d at 89.

Other courts have also found the Fifth Circuit's *Brown* decision controlling. In *National Airlines v. Airline Pilots Association International,* 431 F. Supp. 53 (S.D. Fla. 1976), the court followed *Brown* to find there was no right of action for compensatory damages for a breach of Section 2 First when the union had engaged in bad faith bargaining.

In *CSX Transportation v. Marquar,* No. 90-399, slip op. (E.D. Ky. 1991), *appeal pending,* No. 91-5689 (6th Cir.) (the opinion is set forth in Appendix F at 17a to 21a), the court was faced with a union unlawfully striking over a minor dispute; in all respects, the court noted, this case is indistinguishable from the instant case. (slip op. at 4; 19a). The court recognized that although there were "very valid arguments, supported by the legislative history and fairness concerns, in favor of allowing damages," it was "not in a position to allow such relief." (slip op. at 4; 21a).

Brown stands as a roadblock to lower courts seeking to develop proper remedies under the RLA. However, the reasoning of *Brown* is no longer valid. *Brown* had three bases: (1) because the NLRA had express damage provisions and the RLA did not, Congress intended no damages under the RLA; (2) the civil rights statutes without express remedy provisions, like the RLA at the time, were construed as not allowing damages; and (3) state law allowed a compensatory damages remedy. None of these bases is sound any longer.

This Court has repeatedly admonished that the RLA was not drafted with the same policies or design as the

NLRA. Analogies or comparisons with the NLRA "should be drawn with the utmost care and with full awareness of the differences between these statutory schemes." *Chicago & North Western*, 402 U.S. at 579 n.11.

The RLA was intentionally designed without specific remedies, and the drafters intended that the federal courts enforce and develop appropriate judicial remedies on a case-by-case basis. *Chicago & North Western*, 402 U.S. at 579-81. On the other hand, under the NLRA, Congress set forth detailed provisions regarding specific proscribed activities, established an agency to determine violations of and remedies for violations of those provisions, and permitted direct court action for breaches of collective bargaining agreements. 29 U.S.C. § 151, *et seq.* *Brown's* rationale, that when Congress wanted to set forth a specific remedy in a labor-management statute it knew how to do so, is without merit due to the differences in the schemes between the NLRA and the RLA; and it is particularly unsound in light of the RLA drafters' declared intent and this Court's adoption of such intent. *Chicago & North Western*, 402 U.S. at 876-77.

Brown also compared the absence of a damages remedy under the RLA to the express damage remedies under certain civil rights statutes, 42 U.S.C. §§ 1983, 1985, and 1986. 252 F.2d at 155. *Brown*, again, rationalized that where Congress intended a damages remedy, it had specifically set forth rights of action under those statutes. 252 F.2d at 155. This analogy suffers from the same defects as the panel's analogy to the NLRA, and the blurring of the distinction between rights of action and remedies.

However, since *Brown*, for those civil rights statutes, 42 U.S.C. §§ 1981 and 1982, which do not have express remedies provisions, this Court has held that though Congress did not set forth a specific remedy for violations of those statutes, a damages remedy is available. *Johnson v. Railway Express Agency*, 421 U.S. 454, 460 (1975); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 238 (1969). Particularly relevant here is that the *Sullivan* Court relied upon this Court's decision in *Texas & New Orleans Railroad v. Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548 (1930) ("*Railway Clerks*"), as support for its reasoning that the mere absence of a remedy in a statute does not prohibit the imposition of a remedy by the courts. In *Railway Clerks*, this Court not only found an implied right of action for violation of Section 2 Third of the RLA, but also held that all remedies were available even though the RLA had not expressly stated a remedy. 281 U.S. at 569.

The last basis for *Brown's* decision was the availability of state law remedies. 252 F.2d at 156. The law of preemption has swept away this basis. Even *National Airlines* found that the carrier's state law claims were preempted by the RLA. 431 F. Supp. at 55-56. To the extent that *Brown* depends on the availability of such state law remedies as support for its holding that monetary relief was not available under the RLA, that support is also not sound.

The Fifth Circuit's decisions in *Brown* and in this case have essentially blocked the evolution of the law of remedies under the RLA. Yet, the doctrinal foundation for this line of cases has been entirely eroded. Review in this Court is necessary to permit a fresh and sound approach to the important issue raised here.

II. The Decision Below Conflicts with this Court's Decisions Finding an Implied Cause of Action Under the RLA to Enforce Sections 2 First and 3 First (i).

A. The Railway Labor Act Creates Implicit Causes of Action for Enforcement of the Act's Various Duties and Obligations.

This case is significant to both the rail and airline industries, in that it concerns one of the most important purposes of the RLA. One of the major purposes of the Act is "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein." 45 U.S.C. § 151a(1); *Railway Clerks*, 281 U.S. at 565. To prevent strikes, the RLA imposes various reciprocal obligations upon rail carriers, their employees, and their employees' representatives.

The RLA mandates, under Section 2 First, that it is the duty of the union "to avoid any interruption to commerce or to the operation of any carrier . . . . " 45 U.S.C. § 152 First. The duties under Section 2 First of the RLA were "designed to be a legal obligation, enforceable by whatever appropriate means might be developed on a case-by-case basis." *Chicago & North Western*, 402 U.S. 570, 577 (1971). The Court has also stated that this duty is the "heart" of the RLA. *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-78 (1969), *reh'g denied*, 394 U.S. 1024 (1969). Thus, the Court found an implied cause of action existed under Section 2 First.

Additionally, this Court has recognized that, under the RLA, Congress imposed upon the unions and rail

carriers a Section 3 First (i) duty to resolve minor disputes by binding arbitration and not by self-help. In *Chicago River*, this Court found there was an implied cause of action under Section 3 First (i) which is enforceable by the issuance of an injunction against a threatened strike. *See also Conrail*, 491 U.S. at 303.[1]

Thus, it is beyond dispute that from the language in the RLA creating rights and duties, this Court has recognized implied causes of action for the enforcement of various RLA duties, including Sections 2 First and 3 First (i). *See Cannon v. University of Chicago*, 441 U.S. 677, 691 n.13 (1979). Thus, the sole inquiry is what remedies are available under the RLA to enforce violations of these sections. The general rule this Court has employed is that all remedies are available unless Congress explicitly indicated otherwise. *Davis v. Passman*, 442 U.S. 228, 246-47 (1979). As will be demonstrated in part "B" below, Congress' silence with respect to the remedies for violations of RLA duties was not intended to minimize or undermine the importance of those duties, nor to limit available judicial remedies for their enforcement. Rather, Congress intended for the courts to perform their traditional duty of crafting RLA remedies appropriate to the particular facts and circumstances of each case. This is in keeping

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[1] The airlines do not have a national arbitration board. Rather, Congress provided that airlines and unions should establish arbitration boards by agreement under Section 204 of the RLA. 45 U.S.C. § 184. This Court has found an implied cause of action under Section 204. *Machinists v. Central Airlines*, 372 U.S. 682 (1963), *reh'g denied*, 373 U.S. 947 (1963).

with this Court's longstanding rule that where an implied cause of action exists under the laws of the United States, and Congress does not specify the remedy, courts are empowered to award any appropriate relief. *Bell v. Hood*, 327 U.S. 678 (1946). Because the Fifth Circuit ignored this longstanding rule, this Court should grant the writ of certiorari to allow for the proper development of remedies for the violation of duties under the RLA.

B. Congress has Provided Courts with Discretion to Fashion Appropriate Remedies for Violations of the Railway Labor Act.

The RLA, with a few minor exceptions,[2] does not provide express penalties, relief, or remedies for violations of its substantive provisions. As a result of the lack of express statutory language regarding remedies, in those cases where this Court has recognized implied rights of action under the RLA, the Court has also recognized the general rule. According to that rule, when there is an implied right of action, all appropriate, traditional remedies are presumptively available.

In *Railway Clerks*, this Court established the principle that the absence of express remedies in the RLA did not imply any Congressional limitation on enforcement remedies:

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[2] For instance, the RLA provides for specific remedies for enforcement of adjustment board awards, 45 U.S.C. § 153 First (p) and (q), and enforcement of interest arbitration awards, 45 U.S.C. § 159.

> The absence of a penalty is not controlling. The creation of a legal right by language suitable to that end does not require for its effectiveness the imposition of statutory penalties. Many rights are enforced for which no statutory penalties are provided. In the case of the statute in question, there is an absence of penalty, . . . but . . . a legal obligation is created and the statutory requirements are susceptible of enforcement by proceedings appropriate to each . . . The right is created and the remedy exists (citations omitted).

281 U.S. at 569-70. There, the Court implied a cause of action for violation of Section 2 Third of the RLA. *See Davis*, 442 U.S. at 239 n.17. This Court reaffirmed the availability of remedies in *Virginian Railway Company v. System Federation No. 40*, 300 U.S. 515 (1937), for a violation of Section 2 Ninth of the RLA.

In *Steele v. Louisville & Nashville Railroad Company*, 323 U.S. 192, 203 (1944), this Court further defined the breadth of judicial relief available for violations of the RLA's statutory commands:

> For the present command there is no mode of enforcement other than resort to the courts, whose jurisdiction and duty to afford a remedy for a breach of statutory duty are left unaffected. . . . We conclude that the duty which the statute imposes . . . and that the statute contemplates resort to the *usual judicial remedies of injunction and award of damages* when appropriate.

323 U.S. at 207 (emphasis added). There, an implied cause of action against the unions for breach of the duty of fair representation was found for violation of Section 2 Fourth.

Of particular importance here are this Court's decisions in *Chicago River* and *Chicago & North Western*. In the latter case, the Court instructed federal courts to enforce the legal obligations of Section 2 First of the RLA "by whatever means might be developed on a case-by-case basis." 402 U.S. at 577.

This Court found support for allowing the full range of remedies to be utilized by the lower courts from the legislative history of the Act. The *Chicago & North Western* Court pointed out that the Railway Labor Act of 1926 was an agreement worked out between management and labor and ratified by the Congress and the President. 402 U.S. at 576. "Accordingly, the statements of the spokesmen for the two parties made in the hearings on the proposed Act are entitled to great weight in the construction of the Act." 402 U.S. at 576 n.7. This Court quoted from the testimony of Donald R. Richberg, counsel for the organized railway employees, stating the reasons why the Railway Labor Act was drafted in general language applicable equally to both parties, rather than in terms of specific requirements or prohibitions accompanied by explicit sanctions. Mr. Richberg stated that railroad labor relations would best be served by letting courts craft appropriate remedies in the same manner "in which the common law has developed in England and America." 402 U.S. at 577.[3]

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[3] In yet another passage of the hearings on the 1926 RLA, Mr. Richberg testified that the RLA's silence should not lead to the absence of remedies for violations of the Act:

> We have avoided in the bill in any way setting up any penalty section or any sections for the invocation of any judicial authority, except in the enforcement of an

The "common law" envisioned by the drafters allowed courts to craft appropriate remedies for violations of clear statutory duties. Indeed, this Court has repeatedly subscribed to this principle in the century prior to the enactment of the RLA.[4]

> arbitration award. The thought being this, that so far as this law stated duties imposed upon the parties by act of Congress, if they failed to live up to their duties, and there was any action which a court could take consistent with its powers and its limitations, to compel the enforcement of that duty as a legal obligation, it would be subject to enforcement. But the law for such enforcement or compulsion should be developed in the courts, according to the old common law theory of letting the courts develop the law after the obligations are clearly understood, rather than to write into the law a specific line of penalties and writs of enforcement.

Hearings on Railroad Labor Disputes Before the House Committee on Interstate and Foreign Commerce, H.R. 7180, 69th Cong., 1st Sess., p. 40 (January 26, 1926).

[4] *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (" '[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded' ") (*quoting* 3 W. Blackstone, *Commentaries* 23); *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 624 (1838) ("It cannot be denied but that Congress had the power to command that act to be done; and the power to enforce the performance of the act must rest somewhere, or it will present a case which has often been said to involve a monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist"); *Pollard v. Bailey*, 87 U.S. (20 Wall.) 520, 527 (1874) ("A general liability created by statute without a remedy may be enforced by an appropriate common-law action"); *De Lima v. Bidwell*, 182 U.S. 1 (1901) ("If there be an admitted wrong, the courts will look far to supply an adequate remedy").

Thus, when this Court stated in *Chicago & North Western*, that the duties and obligations of the RLA should be enforced "by whatever means might be developed on a case-by-case basis," 402 U.S. at 577, the Court was applying the longstanding rule that when a statute creates a cause of action and is not specific as to a remedy, the courts may fashion any appropriate remedy. One of those appropriate remedies is monetary relief. This is the principle that should have been found controlling here. Just last term this Court, in *Franklin*, strongly reaffirmed that rule.

C. The Decision of the Court Below Limiting the Available Judicial Remedies for Violations of the RLA is Inconsistent with the Principles Enunciated by this Court Concerning Enforcement of Statutory Rights When the Statute does not Provide Specific Remedies.

In *Franklin*, this Court stated that it will "presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." 112 S. Ct. at 1032 (*citing Davis v. Passman*, 442 U.S. 228, 246-47 (1979)). The Court then recognized that the history of this legal presumption "has deep roots in our jurisprudence." 112 S. Ct. at 1033. Thereafter, the Court summarized:

> The general rule, therefore, is that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute.

112 S. Ct. at 1035.

The Fifth Circuit erroneously rejected this Court's "general rule" in the decision below.[5] Rather than applying this Court's general rule, the court reaffirmed its *Brown* decision which held that "a carrier had no *cause of action* under the Railway Labor Act for damages caused by an illegal strike." 961 F.2d at 89 (emphasis added). The court did not try to reconcile this result with its recognition that there was an implied cause of action for an injunctive remedy against a union's illegal strike under the same section of the RLA. 961 F.2d at 88-89, and n.12. Insofar as the opinion confuses the distinction between an implied cause of action and the available remedies, it is at odds with this Court's decision in *Franklin*. 112 S. Ct. at 1032.

The court below cited no statutory basis for its holding that the remedy available to a carrier for a union's breach of its Section 2 First and 3 First (i) duty does not include monetary relief. In *Franklin*, however, this Court performed a probing analysis of the statute in question to determine whether Congress intended to limit application of the "general rule" and place some implicit limit on the remedies available. The Fifth Circuit's decision demonstrated no such analysis. In fact, any such analysis would find no limit because the drafters of the RLA

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[5] The Fifth Circuit did recognize the existence of the decision in *Franklin* in passing. 961 F.2d at 89 n.9. Yet, the court's analysis was limited to the statement that "[a]gain, even if this court were considering the issue on a clean slate, *Franklin* would not control." *Id.*

intended for the courts to have available all remedies for enforcement of violations of the Act. The court below failed to recognize that the issue of what remedies are available is analytically distinct from the issue of whether a right of action exists in the first place. 112 S. Ct. at 1032 (*citing Davis v. Passman*, 442 U.S. 228, 239 (1979)). For these reasons, it would be appropriate to grant the writ of certiorari in this case.

III. There are Neither Policy nor Statutory Bases for the Decision of the Court Below Which Recognized a Dual Standard Under the RLA, Whereby Unions May Obtain a Monetary Remedy From a Carrier, but a Carrier May not Obtain Such a Remedy From a Union.

In its arguments to the court below, BN urged that certain Fifth Circuit decisions had recognized that a monetary remedy could be awarded under the Act. 961 F.2d at 88 (*citing United Indus. Workers of the Seafarers Int'l Union v. Board of Trustees of Galveston Wharves*, 400 F.2d 320 (5th Cir. 1968), *cert. denied*, 395 U.S. 905 (1969) ("*Galveston Wharves*"). In *Galveston Wharves*, the Fifth Circuit awarded back pay to employees who were wrongfully discharged when the carrier unilaterally altered the terms of an agreement without following the procedures dictated by Section 156, 45 U.S.C. § 156. The court below distinguished *Galveston Wharves* solely on the ground that it involved a different section of the RLA, Section 156. Given that there is no statutory basis for distinguishing between the remedies which are available under Sections 152 First and 153 First (i) and those that are available under Section 156, BN submits that the Fifth Circuit's

decision recognized an inappropriate dual standard. That is, when a carrier unilaterally changes working conditions in violation of Section 156, a monetary remedy is available to the employees, but such a remedy is unavailable to the carrier when a union strikes in violation of Sections 152 First and 153 First (i). There is neither statutory basis nor sound policy for this dual standard.

Further, BN submits that this case is significant to the entire rail industry, as well as the airline industry, because if the decision below is allowed to stand, it would arm the unions with additional remedies which are not available to the carriers. This would result in an unbalanced scheme of labor relations in the railroad and airline industries. Under this skewed scheme, unions can conduct illegal strikes, such as the one in this case, with impunity.[6] The carrier's only remedy, under the rule announced by the court below, is to obtain an injunction as swiftly as possible to prohibit the union from doing that which was unlawful. Until the carrier is able to obtain an injunction, the union is free to impose economic

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[6] In this case, the object of the union's strike was not for any other lawful purpose. Rather, BN submits the purpose of this strike was a public protest. This contention is evidenced by the fact that the union's strike was called for only a short (24 hour) duration and was heavily publicized by a professional public relations firm. Statements made in the union's press release indicated that the strike was called because "compromise was not working nor was arbitrating the issue . . . " (Rec. 328).

havoc on the carrier without fear of any sanction.[7] Even after obtaining the injunction, the carrier continues to shoulder the economic loss. There is nothing in the language of the RLA or the rationale of this Court's decisions to support this disparate treatment. Congress placed the mutual obligations of Sections 2 First and 3 First (i) on both the carriers and the employees or their representatives. In the current deregulated atmosphere, the carriers will suffer even more from this asymmetry.

The economic and regulatory development of the air and rail transportation industries, whose labor relations are governed by the RLA, is at a crucial juncture. Both industries, as well as the motor carrier industry, were substantially deregulated in the period 1978-1980.[8] The major policy changes brought about by deregulation are embodied, for the rail industry in particular, in the policy statement which introduced the deregulatory act. *See* 49 U.S.C. §§ 10101a(1)-10101a(15). By placing railroads in the flux of market forces, Congress strongly encouraged individualized services and pricing of those services. The expected result of this new competitive environment was that railroads would begin customizing their services to

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[7] In the instant case, the BMWE publicized its success to its members by claiming that normal railroad operations were severely disrupted: "We should consider this a victory!" (Rec. 235, 263).

[8] The airlines were deregulated by the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978); the railroads by the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1897 (1980); and the motor carriers by the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980).

meet marketplace demands to the greatest extent possible. One of the natural outcomes of this process during the past dozen years has been a frequent need by the railroads to utilize the contours of their existing collective bargaining agreements and work rules in order to meet the marketplace demands. *Cf. Conrail*, 491 U.S. at 309. The union's reaction, as evidenced here by the BMWE, is to protest the RLA scheme of compulsory arbitration by striking BN over an obviously minor dispute. Without the availability of all remedies, the unions will increasingly be inclined to sidestep congressionally mandated RLA arbitral resolution mechanisms in these disputes, and resort to self-help. The decision below will be viewed as a sanction of the protest movement. By recognizing the availability of a monetary remedy for a carrier as a result of a union's unlawful self-help in a minor dispute, the Court can promote the channeling of these disputes to compulsory arbitration as mandated by Congress. *See also Conrail*, 491 U.S. at 311.

In the absence of review by this Court, the rule perceived as binding by the lower courts will continue to have an adverse affect: it will encourage both economic disruption and less utilization of congressionally mandated arbitration. Without the prospect of a monetary remedy, the unions have little reason to refrain from striking in a minor dispute. Because no monetary remedy is available, carriers are left to seek prospective injunctive relief in every such case and at the earliest possible moment. The courts are repeatedly drawn into the battle. This is not what Congress intended when enacting the compulsory arbitration procedures of the RLA. This economic disruption by the unions continues to have an adverse

affect on the public and the long-term health of these critical transportation industries.

CONCLUSION

For these reasons, a writ of certiorari should issue and the judgment and decision of the Fifth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX A

BURLINGTON NORTHERN RAILROAD CO., a corporation, Plaintiff-Appellant,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, an unincorporated association, et al., Defendants-Appellees.

No. 91-1440.

United States Court of Appeals,
Fifth Circuit.

May 22, 1992.

Rehearing and Rehearing En Banc
Denied July 9, 1992.

Railroad sought injunctive and monetary relief against union for illegal strike. The United States District Court for the Northern District of Texas, John McBryde, J., granted injunction but denied monetary relief. Railroad appealed. The Court of Appeals, Wisdom, Circuit Judge, held that carrier had no cause of action under Railway Labor Act for damages caused by illegal strike.

Affirmed.

* * *

Thomas J. Knapp, Lawrence M. Stroik, Charles W. Shewmake, Burlington Northern R. Co., Ft. Worth, Tex., for plaintiff-appellant.

Sanford Ross Denison, William A. Bon, Susan H. Durham, Irving, Tex., for defendants-appellees.

Appeal from the United States District Court For the Northern District of Texas.

Before WISDOM, JONES, and SMITH, Circuit Judges.

WISDOM, Circuit Judge.

The plaintiff-appellant, Burlington Northern Railroad Company ("BN"), contends that the district court erred by dismissing its demand for monetary relief. BN challenges the district court's application of *Louisville & Nashville Railroad Co. v. Brown*,[1] a decision of this Court, to the facts of this case. BN also questions the continued validity of that precedent. We affirm.

I. BACKGROUND

The defendant-appellee, the Brotherhood of Maintenance of Way Employees ("BMWE" or "the union"), is the collective bargaining representative of certain employees of BN. BMWE and BN are parties to a collective bargaining agreement that governs the hours of service, rates of pay, and working conditions of the covered employees ("the Schedule Agreement"). BMWE and BN are also parties to a supplemental agreement concerning employment of union members in the process of laying railroad ties, specifically in connection with the use of the P811-S, a machine that lays concrete ties ("the P811-S Agreement").

In March 1990, BN notified BMWE that it intended to utilize a newly developed clip and insulator installation machine ("the clipcar") in the process of laying concrete ties. BN stated that the contractor's personnel would be

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[1] 252 F.2d 149 (5th Cir.), *cert. denied*, 356 U.S. 949, 78 S.Ct. 913, 2 L.Ed.2d 843 (1958).

operating this new machine rather than BMWE members. BMWE objected to BN's plans to contract out this work, and requested a conference to discuss the matter.

During the conference held on April 5, 1990, BN argued that it was entitled to contract out this work by virtue of provisions in the Schedule Agreement that allow BN to contract out work under specified conditions. BMWE, on the other hand, stated that this work was covered by the provisions of the P811-S Agreement that require all "clipping" work to be "bulletined"[2] to BMWE members.

In May 1990, BMWE notified BN that if BN proceeded to contract out this work, the union would consider this to be a unilateral change in the P811-S Agreement.[3] BN responded that it had the right to contract out this work and that to do so would not constitute

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[2] A bulletin is the procedure whereby members of BMWE bid on jobs.

[3] In the terminology used in discussions of the Railway Labor Act, a dispute over changes in rates of pay, rules, or working conditions is a "major dispute". A dispute arising out of grievances or out of the interpretation or application of agreements concerning the rates of pay, rules, or working conditions is a "minor dispute".

Under the Act, minor disputes are subject to compulsory arbitration and the parties may not resort to self-help. Thus, a district court may enjoin a strike over a minor dispute. Major disputes are the subject of voluntary arbitration, and the parties may resort to self-help only after the procedures described in the Act have been exhausted. A strike by the union over a major dispute may also be enjoined prior to exhaustion of those procedures, unless the carrier has already violated the status quo by making a unilateral change in working conditions.

a unilateral change in any of the agreements between the parties.

BN had learned that BMWE planned to strike over this issue and filed an action against BMWE[4] seeking injunctive relief and damages. BN also moved for a temporary restraining order. The district court issued a TRO at 2:30 a.m. on June 26, 1990, enjoining the strike. On June 26, 1990, at 6:00 a.m., before being served with the TRO, BMWE initiated a twenty-four hour strike against BN in response to BN's contracting out for the clipcar work. Upon notice of the entry of the TRO, BMWE ceased all strike activity. The parties agreed to continue the TRO until after a hearing on BN's motion for a preliminary injunction.

The hearing on the preliminary injunction was held on August 20, 1990. The court, without ruling on BN's demand for monetary relief, granted the preliminary injunction. The court found a substantial likelihood that the dispute was a minor dispute under the Railway Labor Act, and that therefore BMWE could not resort to self-help.[5]

In January 1991, BN moved for summary judgment on its demands for a permanent injunction and for monetary relief. In February 1991, BMWE moved to dismiss BN's demand for monetary relief. On February 14, 1991,

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[4] The complaint also named as defendants several individual officers of BMWE. For convenience, the defendants will be referred to collectively as "BMWE".

[5] The parties have not appealed any of the court's rulings with respect to the preliminary injunction.

the district court granted BN's motion for summary judgment with respect to the permanent injunction, but denied the motion with respect to the demand for monetary relief. On March 7, 1991, the district court granted BMWE's motion to dismiss BN's demand for monetary relief, and entered a final judgment. After the district court granted a motion to reconsider, and amended the permanent injunction, BN timely noticed this appeal from the order granting BMWE's motion to dismiss the demand for monetary relief.

II. DISCUSSION

On appeal, BN contends that the district court erred in dismissing its demand for monetary relief. The district court granted BMWE's motion to dismiss on the authority of this Circuit's decision in *Louisville & Nashville Railroad Co. v. Brown*. BN contends that the district court incorrectly applied *Brown* to the facts of this case. BN argues alternatively that, if *Brown* does control this case, it should be overruled.

A. The applicability of *Brown*.

In *Brown*, a railroad brought suit against several of its employees seeking damages caused by the employees' inciting a strike that shut down the railroad for three days. On appeal this Court recognized that 45 U.S.C. § 152 First creates a duty on the part of the employees "to exert every reasonable effort . . . to settle all disputes . . . in order to avoid any interruption to commerce

or to the operation of any carrier". The Court held, however, that § 152 First did not create a cause of action for damages caused by an illegal strike.

In this case, BN seeks damages caused by BMWE's short-lived, illegal strike.[6] BN contends that BMWE is liable for the losses suffered by BN due to BMWE's violation of its duty under § 152 First and § 153 First (i) to submit a minor dispute to binding arbitration. BN argues on appeal that *Brown*, which held that damages were not available for a violation of this duty, can be distinguished from the present suit.

BN first attempts to distinguish *Brown* on its facts. Apparently, BN would have this Court limit the holding of *Brown* to situations in which the employer sues individual employees rather than the union. While the factual situations may differ, the holding in *Brown* was not limited to its particular facts. Furthermore, we see no reason to so limit the holding of *Brown*. Indeed, other courts have recognized *Brown* as holding that there is no cause of action against a union for damages for a breach of the § 152 First duty.[7]

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[6] BMWE's strike must be considered illegal in light of the district court's finding that the dispute was minor. BMWE does not challenge this finding.

[7] *See, e.g., Kennedy v. Long Island R.R.*, 319 F.2d 366, 372 n. 7 (2d Cir.), *cert. denied*, 375 U.S. 830, 84 S.Ct. 75, 11 L.Ed.2d 61 (1963); *Maas v. Frontier Airlines, Inc.*, 676 F.Supp. 224, 227 (D.Colo. 1987); and *National Airlines, Inc. v. Airline Pilots Ass'n Int'l*, 431 F.Supp. 53, 54 (S.D.Fla.1976). *See also* Dennis A. Arouca, *Damages for Unlawful Strikes Under the Railway Labor Act*, 32 Hastings L.J. 779, 793 (1981) (In *Brown* the Fifth Circuit "refus[ed] to allow damages to carriers for union violation of sections 2 First and 3").

BN also argues that *Brown* did not consider whether damages could be awarded as part of equitable relief. BN argues that this Court's decision in *United Industrial Workers of the Seafarers Int'l Union v. Board of Trustees of Galveston Wharves,*[8] holds that monetary relief may be awarded as part of the equitable relief ordered by the court. In *Galveston Wharves* the Court awarded back pay to employees who were wrongfully discharged when the carrier unilaterally altered the terms of a collective bargaining agreement without following the procedures dictated by 45 U.S.C. § 156.

Galveston Wharves is inapposite to this case. The monetary award in *Galveston Wharves* was in response to a violation of § 156; *Brown* addressed a violation of § 152 First. The holding of *Galveston Wharves* that monetary relief is available for a breach of § 156 does not conflict with the holding of *Brown* that no monetary relief is available for a breach of § 152 First.[9] Nor do we find that

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[8] 400 F.2d 320 (5th Cir. 1968), *cert. denied,* 395 U.S. 905, 89 S.Ct. 1747, 23 L.Ed.2d 219 (1969).

[9] The duties created by the two sections of the Act are not identical. Section 156 concerns the carrier's and the union's duty to maintain the status quo while negotiating changes in collective bargaining agreements. There are no cases stating that damages are not available to the carrier if the union violates this duty.

Because it considers a different section of the Act, *Galveston Wharves* would not control the outcome of this case even if this Court were considering the issue on a clean slate. Note also that the Court in *Galveston Wharves* did not even mention *Brown,* which indicates that the issues in the two cases were not thought to be related.

BN also suggests that *Franklin v. Gwinnett County Public Schools,* ___ U.S. ___, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992),

the holding of *Brown* is limited to a situation in which the plaintiff classifies the damages as a legal remedy as opposed to an equitable remedy. Regardless of the label attached to the damages sought, the nature of the relief sought in this case is identical with that sought in *Brown* – the railroad wants to recover the money it expended as a result of the illegal strike. *Galveston Wharves* provides no support for BN's position.

While the *Brown* holding did not directly address a violation of § 153 First (i), we find that a violation of this section is within the holding of *Brown*.[10] Section 153 First (i) mandates compulsory arbitration to resolve minor disputes.[11] When an illegal strike occurs over a minor dispute, the employees or the union have violated not only § 152 First but also § 153 First (i). We find that the holding in *Brown* is not limited to the situation in which the carrier fails to plead the violation of the latter section. We are also not aware of any case in which damages have been awarded for violation of § 153 First (i).[12]

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undermines *Brown*. *Franklin* holds that damages are available in a suit under Title IX. Again, even if this Court were considering the issue on a clean slate, *Franklin* would not control.

[10] *See*, Arouca, *supra* note 7, at 792-93 (indicating that *Brown* held that damages were not allowed for a violation of § 152 First or for a violation of § 153).

[11] *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R.*, 353 U.S. 30, 39, 77 S.Ct. 635, 639, 1 L.Ed.2d 622 (1957).

[12] In *Chicago River* the Supreme Court held that an injunction could issue to enjoin compliance with § 153 First (i); the Court did not address the question of whether damages could be awarded.

This Court previously held in *Brown* that a carrier had no cause of action under the Railway Labor Act for damages caused by an illegal strike. The district court correctly held that the holding in *Brown* controlled the disposition of the present suit.

B. The continued validity of *Brown*.

BN argues alternatively that *Brown* should be overruled. "In this circuit one 'panel may not overrule the decision, right or wrong, of a prior panel' in the absence of en banc reconsideration or superseding decision of the Supreme Court."[13] This Court has never considered the issue en banc.[14] BN has not directed the attention of this Court to any Supreme Court decision holding that monetary relief is available for a breach of the § 152 First duty.[15] Thus, this panel is bound to follow the holding in *Brown*.

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[13] *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 465 (5th Cir. 1991) (quoting *Brown v. United States*, 890 F.2d 1329, 1336 (5th Cir. 1989)) (other citations omitted).

[14] Indeed, in the history of the Railway Labor Act, the *Brown* panel is the only federal appellate court to have considered the question.

[15] There are *no* reported cases awarding damages for the breach of the § 152 First duty. In *Denver & R.G.W.R.R. v. Brotherhood of R.R. Trainmen*, 387 U.S. 556, 87 S.Ct. 1746, 18 L.Ed.2d 954 (1967), the Supreme Court was presented with a case in which the district court had awarded damages. The only issue decided by the Supreme Court, however, was a venue issue; the Court did not address the issue of monetary relief. On remand to the district court, the case was apparently dismissed with prejudice and the damages were never collected. Thus, *Denver* does not provide any authority for the proposition that monetary relief is

III. CONCLUSION

The district court correctly dismissed the demand for monetary relief on the authority of *Brown*. The decision of the district court is AFFIRMED.

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available.

See also, Harry Lustgarten, *Principles of Railroad and Airline Labor Law* (1984):

> The Railway Labor Act does not specifically authorize a carrier to recover damages for an unlawful strike and there has been no judicial decision indicating that such a right exists. It appears unlikely, moreover, that the courts in the future would be inclined to allow such damages in view of the potential impact it might have upon the unions' ability to represent the employees.

Id. at 157.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

BURLINGTON NORTHERN RAILROAD COMPANY,	§	
Plaintiff,	§	CIVIL ACTION
VS.	§	NO. 4-90-463-A
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, ET AL,	§	(Filed March 7, 1991)
Defendants.	§	

ORDER

Came on for consideration the motion of defendants, Brotherhood of Maintenance of Way Employes, Ben Ochoa, E. R. Spears, Paul S. Swanson, and Bruce G. Glover, to dismiss plaintiff's claim for damages or other monetary relief. The court, having considered the motion, the response of plaintiff, Burlington Northern Railroad Company, thereto, and the record as a whole, finds that the motion is well-taken and should be granted. The law is clear that there is no statutory right of action for damages for breach of a § 2 First Duty under the Railway Labor Act. 45 U.S.C. § 152 First. *Louisville and Nashville Railroad Company v. Brown*, 252 F.2d 149, 155 (5th Cir.), *cert. denied*, 356 U.S. 949 (1958); *National Airlines, Inc. v. Airline Pilots Association International*, 431 F. Supp. 53, 54 (S.D. Fla. 1976).

The court ORDERS that defendants' motion to dismiss plaintiff's claim for damages or other monetary relief be and is hereby granted and plaintiff's claims for monetary relief are hereby denied.

By this order, the court is fully and finally disposing of all remaining claims in this action. By orders dated February 14, 1991, the court granted plaintiff's motion for summary judgment on the issue of permanent injunctive relief and granted plaintiff a permanent injunction. The court further ORDERS that all costs in this action be and are hereby assessed against defendants.

SIGNED March 7, 1991.

/s/ John McBryde
JOHN MCBRYDE
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-1440

BURLINGTON NORTHERN RAILROAD CO.,
a corporation,

Plaintiff-Appellant,

versus

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES, an unincorporated association,
ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 05-22-92, 5 Cir., 198_, ___ F.2d ___)

(Filed July 9, 1992)

Before WISDOM, JONES and SMITH, Circuit Judges.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ John Minor Wisdom
United States Circuit Judge

APPENDIX D

Section 2 First of the Railway Labor Act
45 U.S.C. § 152 First

First. Duty of carriers and employees to settle disputes

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

APPENDIX E

Section 3 First (i) of the Railway Labor Act
45 U.S.C. § 153 First (i)

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 90-399

CSX TRANSPORTATION, INC.,

PLAINTIFF,

V.

MEMORANDUM OPINION
(Filed MAY 3, 1991)

N.J. MARQUAR, et al.,

DEFENDANTS.

This matter is before the Court upon the defendants' motion for dismissal. The plaintiff, CSX Transportation, has filed this action seeking damages pursuant to the Railway Labor Act (the "RLA"), 45 U.S.C. Sec. 151 *et seq.*,

FACTUAL BACKGROUND

CSX Transportation, Inc. ("CSXT") assigned one of its stationary gangs to begin repairs on a portion of railway located between Cincinnati, Ohio and Louisville, Kentucky on September 10, 1990. In order to perform its duty, this gang was required to work away from its headquarters in Cynthiana, Kentucky.

During the course of this particular job, a dispute arose between CSXT and the labor representative, the

Brotherhood of Maintenance of Way Employees ("BMWE"). The disagreement arose due to the different manner in which CSXT and its workers interpreted a collective bargaining agreement to which both sides subscribed. CSXT provided lunch for the stationary gang by taking orders from members of the gang, sending a truck to pick up lunches, delivering the meals to the work site, and allowing the workers to eat their lunches on the site. Members of the gang asserted the position that, because the work the gang was performing required the members to carry out their duties away from their headquarters, the workers were entitled to be taken, at the expense of CSXT, to a hotel where some of the workers were staying, and be permitted to eat their lunches there.

Without express authorization from BMWE, the Dixie Federation, BMWE's appointed representative, voted to strike over this matter. This strike, which began on September 24, 1990, spread into eight states and CSXT suffered substantial damages as a result. On October 10, 1990, this Court issued a temporary restraining order to prevent any further stoppage of CSXT's operations. CSXT is now asking for the damages it claims it suffered as a result of the strike.

Analysis

On a motion to dismiss, "the allegations of the complaint are generally taken as true." *Hughes v. Rowe*, 449 U.S. 5, 10 (1980). The Sixth Circuit Court of Appeals has emphasized:

> A motion to dismiss based on either lack of subject matter jurisdiction or failure to state a

> claim upon which relief can be granted must be viewed in the light most favorable to the party opposing the motion. Similarly, the Court must accept as true all the well-pled allegations in the complaint under attack.

Great Lakes Steel, Div. of Nat'l Steel v. Deggendorf, 716 F.2d 1101, 1105 (6th Cir. 1983). All factual ambiguities are resolved in favor of the plaintiff's complaint, and "extrinsic evidence cannot be considered in determining whether the complaint states a claim." *Roth Steel Products v. Sharon Steel Corp.*, 705 F.2d 134, 155 (6th Cir. 1983).

In order to find in favor of CSXT, the Court must first find that BMWE violated the RLA. The RLA provides that employees do not have the option to strike if the matter in dispute is "minor." Viewing the evidence in the light most favorable to CSXT, the disagreement at issue was "minor." Consequently, the employees were not entitled to strike, and the RLA was violated.

The language of the RLA does not explicitly address whether damages are available to a party who has been injured as a consequence of another party's failure to follow the provisions of the RLA. CSXT argues that the RLA purposefully left to the courts the task of developing the remedies for breach of duties imposed by the RLA on unions and carriers.

Since the RLA is silent on the issue of damages, this Court would have to infer a cause of action in order to allow CSXT's suit against BMWE to continue. It has consistently been held that courts shall be allowed a large degree of discretion in interpreting the RLA. For example, courts routinely grant injunctions under the RLA,

even though the language of the Act does not specify injunctive relief. *See Consolidated Rail Corp. v. Railway Labor Executives Ass'n,* 109 S.Ct. 2477 (1989).

Yet, only one court has seemingly allowed damages in favor of a carrier due to a violation of the RLA. *Denver & Rio Grande Western R.R. v. Brotherhood of R.R. Trainmen,* 58 L.R.R.M. (BNA) 2568 (D.Colo. 1965), *rev'd on other grounds,* 367 F.2d 137 (10th Cir. 1966), *rev'd,* 387 U.S. 556 (1967). In this case, a district court awarded damages against a union for injuries that resulted from a strike. The district court's holding was reversed by the Tenth Circuit Court of Appeals, based on venue. On appeal, the United States Supreme Court discussed the damage award, but only in regard to the factual background of the case. The Supreme Court reversed the court of appeals on the venue issue and remanded the case to the district court, whose final decision did not discuss the theory upon which liability was based.

The Fifth Circuit Court of Appeals has specifically addressed this issue and held that no right to recover damages exists under the RLA. *Louisville and N.R.R. Co. v. Brown,* 252 F.2d 149 (5th Cir. 1958). In *Brown* the court refused to imply a damages remedy based in tort directly from the RLA.

Although CSXT criticizes the Court's reasoning in *Brown,* courts have followed its holding. *National Airlines, Inc. v. Airline Pilots,* 431 F.Supp. 53 (S.D. Fla. 1976). The court held that *Brown* was still valid precedent, and it denied an award of damages to a carrier for an invalid strike. The court reasoned that, because Congress had not taken any action that contradicted the result in *Brown,*

Congress must have intended this result. *Id.* at 54. The *National Airlines* court also rested its findings on the often stated proposition that allowing a carrier to seek damages from a union would be giving carriers a weapon which they could use to keep unions "in line" and therefore upset the balance of power. *Id.*

Recently, in *Burlington Northern R.R. Co. v. Brotherhood of Maintenance of Way Employees, et al.*, No. 4-90-463-A (March 7, 1991), the United States District court for the Northern District of Texas dismissed the railroad's claim for incidental and consequential damages resulting from an apparently invalid strike. The facts, procedural posture, and issues presented in *Burlington Northern* are indistinguishable from the case at bar.

While CSXT makes some very valid arguments, supported by the legislative history and fairness concerns, in favor of allowing damages, this Court is not in a position to allow such relief. In the long history of the RLA, no court has explicitly allowed recovery of money damages in this type of situation. The absence of such case authority, combined with the failure of Congress to intervene and affirmatively approve such remedies, requires this Court to dismiss CSXT's claims.

On this 3rd day of May, 1991.

/s/ Karl S. Forester
KARL S. FORESTER, JUDGE

Supreme Court, U.S.
FILED
DEC 4 1992
OFFICE OF THE CLERK

No. 92-606

In The

Supreme Court of the United States

October Term, 1992

BURLINGTON NORTHERN RAILROAD COMPANY,

Petitioner,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, an unincorporated association, BEN OCHOA, GENERAL CHAIRMAN, E. R. SPEARS, GENERAL CHAIRMAN, PAUL S. SWANSON, GENERAL CHAIRMAN, and BRUCE G. GLOVER, GENERAL CHAIRMAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

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PARTIES TO THE PROCEEDING BELOW AND RULE 29.1 STATEMENT

All parties to the proceeding below are identified in the caption of this petition.

Burlington Northern Inc., is the parent company of petitioner, Burlington Northern Railroad Company. The partially owned subsidiaries of petitioner Burlington Northern Railroad Company are:

The Belt Railway Company of Chicago
Burlington Northern (Manitoba) Limited
Camas Prairie Railroad Company
Davenport, Rock Island and North Western Railway Company
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Keokuk Union Depot Company
Longview Switching Company
M T Properties, Inc.
Northern Radio Ltd.
Paducah & Illinois Railroad Company
Portland Terminal Railroad Company
Terminal Railroad Association of St. Louis
Trailer Train Company
The Wichita Union Terminal Railway Company

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

I. THE UNANIMOUS HOLDING OF THE SIXTH CIRCUIT THAT *FRANKLIN* APPLIES, CONFLICTS WITH THE FIFTH CIRCUIT'S DECISION IN *BURLINGTON NORTHERN* 2

II. THE MAJORITY OF THE *MARQUAR* PANEL MISINTERPRETED *FRANKLIN* AND RELIED ON *BROWN* AND *BURLINGTON NORTHERN* TO FIND NO DAMAGES AVAILABLE IN ANY MINOR DISPUTE CASE WHERE THE UNION UNLAWFULLY STRIKES 4

A. Majority's View of an Absence of Decisional Law Under the RLA is not Supported by the Common Law 5

B. The "Delicate Balance" found by the Majority is an Unsupported Philosophical View of the RLA 6

C. Congress Intended the Courts to Develop the Remedies Under the RLA 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Association of Flight Attendants v. Delta Airlines, Inc., 879 F.2d 906 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990) 6

Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad, 353 U.S. 30 (1957) ..... *passim*

Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969), *reh'g denied*, 394 U.S. 1024 (1969) 7

Brotherhood of Railroad Trainmen v. Toledo, Peoria & Western Railroad, 321 U.S. 50 (1944) 6

Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way Employees, 961 F.2d 86 (5th Cir. 1992) ..... *passim*

Chicago & North Western Railway v. United Transportation Union, 402 U.S. 570 (1971) 3

CSX Transportation, Inc. v. Marquar, No. 91-5689, 1992 U.S. App. LEXIS 29800 (6th Cir. November 13, 1992) ..... *passim*

Franklin v. Gwinnett County Public Schools, ___ U.S. ___, 112 S. Ct. 1028 (1992) ..... *passim*

International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42 (1979) 7

John Morrell & Co. v. Local Union 304A, 913 F.2d 544 (8th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 1683 (1991) 7

TABLE OF AUTHORITIES – Continued

Page

Louisville & Nashville Railroad Company v. Brown, 252 F.2d 149 (5th Cir.), *cert. denied*, 356 U.S. 949 (1958) ..... *passim*

United Industrial Workers of the Seafarers International Union v. Board of Trustees of Galveston Wharves, 400 F.2d 320 (5th Cir. 1968), *cert. denied*, 395 U.S. 905 (1969) 6

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

Petitioner, Burlington Northern Railroad Company ("BN"), files this Supplemental Brief in support of its Petition for Writ of Certiorari filed on October 7, 1992. This brief will discuss the recent unreported decision of *CSX Transportation, Inc. v. Marquar,* No. 91-5689, 1992 U.S. App. LEXIS 29800 (6th Cir. November 13, 1992) ("*Marquar*").[1] A sharply divided panel of the Sixth Circuit affirmed the decision of the

[1] This decision results from the appeal of the district court opinion cited in petitioner's Petition for Writ of Certiorari at 12. The appellate court opinion is set forth here in the Appendix ("App.") at 1a-58a.

district court to dismiss CSX's claim for damages as a result of the unlawful strike by the Brotherhood of Maintenance of Way Employes in a minor dispute.

As shown below, the panel unanimously[2] found that *Franklin v. Gwinnett County Public Schools*, ___ U.S. ___, 112 S. Ct. 1028 (1992) ("*Franklin*"), applied to implied causes of action under the Railway Labor Act ("RLA"), thus creating a conflict in reasoning with the Fifth Circuit's decision in *Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way Employes*, 961 F.2d 86, 88-89 n.9 (5th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3314 (U.S. October 7, 1992) (No. 92-606) ("*Burlington Northern*"). (*See* BN's Petition for Writ of Certiorari at 21-23). However, a majority of the panel misinterpreted *Franklin* and utilized *Louisville & Nashville Railroad Co. v. Brown*, 252 F.2d 149 (5th Cir.), *cert. denied*, 356 U.S. 949 (1958) ("*Brown*"), to hold that even though the RLA contains an implied right of action against a union's strike action in a minor dispute case, no damages would ever be allowable in those cases. Because the majority relied upon *Brown* and *Burlington Northern* to reach this holding, the proper development of the available remedies for violations of the RLA has again been halted. It is appropriate at this time for the Court to address the issue of whether the full range of remedies are available under the RLA in a minor dispute case, in which the union unlawfully strikes a carrier.

I. THE UNANIMOUS HOLDING OF THE SIXTH CIRCUIT THAT *FRANKLIN* APPLIES, CONFLICTS WITH THE FIFTH CIRCUIT'S DECISION IN *BURLINGTON NORTHERN.*

The *Marquar* panel acknowledged that the question of whether monetary damages are available under the RLA for an illegal strike was one of first impression in the Sixth Circuit, and only the Fifth Circuit had previously addressed

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[2] J. Batchelder wrote the opinion for the unanimous court, but her opinion on the finding that damages were available for a union's unlawful strike in a minor dispute became a dissent. (Slip op. at 1; 1a).

this issue. The panel unanimously went on to find that this Court's decision in *Franklin* provided the framework which governed its approach in deciding the question.

The panel first disagreed with the argument propounded by the union and implicitly accepted by the Fifth Circuit in *Burlington Northern* (961 F.2d at 89 n.9), that *Franklin* was applicable only to civil rights statutes. (Slip op. at 7 n.4; 8a n.4). The court found that *Franklin* set forth the general rule which applies to "any federal statute." *Id.* The court then pursued the *Franklin* analysis by initially noting that the RLA does not explicitly provide for rights of action, but that this Court has found an implied right of action in the RLA against an unlawful strike in a minor dispute case, *citing Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad,* 353 U.S 30, 42 (1957). (Slip op. at 7; 9a). Therefore, the panel found, in accordance with *Franklin,* that "because an implied right of action already exists under the RLA in this situation, . . . all 'appropriate' remedies are available 'unless Congress has expressly indicated otherwise.' " (citation omitted) (Slip op. at 9; 11a-12a). The panel then, under *Franklin's* instruction, evaluated the " 'state of the law when the legislature passed [the RLA]' to determine whether Congress intended to limit the presumption in favor of all appropriate relief." (citation omitted) (Slip op. at 10; 12a).

The unanimous court reviewed the state of the law at the time of the enactment of the RLA and found, as BN has set forth in its Petition at 20 and n.4, that there was no intent on the part of Congress to abandon the traditional presumption in favor of all available remedies. (Slip op. at 10; 12a). The court noted that even though Congress amended the RLA after this Court's *Chicago River* decision found an implied right of action under the RLA, Congress has never indicated that any particular remedy was not appropriate to compensate a carrier for an unlawful strike over a minor dispute. (Slip op. at 10; 13a). Thus, the unanimous panel found that "we must presume that all appropriate remedies are available, and accordingly, we have the power to enforce the RLA through 'whatever appropriate means might be developed.' *Chicago &*

N.W. Ry. v. United Transp. Union, 402 U.S. 570, 577, 91 S. Ct. 1731, 1735 (1971)." (Slip op. at 11; 13a-14a).

The unanimous panel ended its *Franklin* analysis by noting that the legislative history ordinarily is not helpful when the Supreme Court, and not Congress, has created the right of action, but that the RLA presented an unusual case in that the legislative history directly states Congress' intent that the courts have the power to "fashion a whole spectrum of remedies." (Slip op. at 11; 14a). Here, the unanimous panel found not only that the *Franklin* presumption was applicable, but also that the clear Congressional intent was to leave to the courts the power to enforce rights of action "with all available remedies." (Slip op. at 11-12; 14a). The court concluded that "[t]he RLA, therefore, presents the very strongest case for finding that a full range of remedies is available." (footnote omitted) (Slip op. at 12; 15a). From here, the majority embarked on a misinterpretation of *Franklin* and flawed reasoning to reach its conclusion that damages would never be available in a minor dispute where the union strikes a railroad.

II. THE MAJORITY OF THE *MARQUAR* PANEL MISINTERPRETED *FRANKLIN* AND RELIED ON *BROWN* AND *BURLINGTON NORTHERN* TO FIND NO DAMAGES AVAILABLE IN ANY MINOR DISPUTE CASE WHERE THE UNION UNLAWFULLY STRIKES.

Even though the unanimous court noted "that the right of action implied by the Supreme Court in *Chicago River* was to enforce compliance with the RLA[, t]hat right of action is not merely for the specific remedy provided in that case – injunctive relief – but a general right of action that can be enforced with any appropriate remedy" (Slip op. at 17; 21a); a majority of the panel erroneously held that legal damages can never be appropriate when a union illegally strikes a railroad over a minor dispute. The majority holding had three bases: (1) no court in the 66 year history of the RLA has published an opinion allowing such damages, and thus the common law that has emerged under the RLA does not contemplate awards of damages between unions and railroads; (2) damage awards between railroads and unions are inappropriate because they

threaten the delicate balance intended by the RLA; and (3) no demonstration was made to show that a change should be required in the common law because injunctive relief is no longer good enough in such cases. *Brown* was the cornerstone for these three bases. The majority, in effect, used *Brown* to obstruct the development of the law of remedies under the Railway Labor Act.

The other flaw in the majority's reasoning is demonstrated by its misinterpreting *Franklin* and creating an appropriateness test as an additional level of inquiry prior to deciding whether all remedies are to be available under the RLA. (Slip op. at 41-47; 50a-58a). That additional test has no support in the *Franklin* decision, and it led to the erroneous result in *Marquar.* Appropriateness was not intended to be used as an additional test to deny a class of remedies for a particular implied right of action. The appropriateness of any particular remedy was left to the district courts to determine on a case-by-case basis. *Franklin,* 112 S. Ct. at 1034; *Marquar,* dissenting opinion, slip op. at 17; 21a.

A. Majority's View of an Absence of Decisional Law Under the RLA is not Supported by the Common Law.

In examining the 66 year history of the RLA, the majority stated that no federal court had published an opinion holding that a union may recover damages from a railroad, or that a railroad may recover damages from a union, but only that individual employees are allowed to recover damages from their unions or their carriers. The majority stated that to allow damages would permit the railroads and unions to use damages as a club against each other. (Slip op. at 43; 53a). No authority was cited by the majority for this philosophical view of the RLA. Though the majority may hold this view, it was not the drafters' intent. Nowhere in the majority's decision discussing the legislative history of the RLA is there any mention that the drafters intended that a type of remedy not be allowed by the courts because it could be used as a "club." To the contrary, the passages of legislative intent cited by J.

Batchelder for the unanimous court established that the drafters intended that all remedies be available. (Slip op. at 13-16; 16a-20a).

Eighteen years after the enactment of the RLA, this Court, in *Brotherhood of Railroad Trainmen v. Toledo, Peoria & Western Railroad,* 321 U.S. 50, 56 (1944), specifically indicated that a railroad may pursue a damage remedy against a union for the union's failure to negotiate in good faith. More recently, the Court of Appeals for the District of Columbia Circuit held that under the RLA a union could pursue a damage remedy in arbitration against an airline for its breach of a successorship clause in a collective bargaining agreement. *Association of Flight Attendants v. Delta Airlines, Inc.,* 879 F.2d 906 (D.C. Cir. 1989), *cert. denied,* 494 U.S. 1065 (1990). The common law of the RLA does not support the majority's view of an absence of decisional law.

Ironically, the majority seemed to endorse full equitable relief, including monetary recovery, when it attempted to distinguish *United Industrial Workers of the Seafarers International Union v. Board of Trustees of Galveston Wharves,* 400 F.2d 320 (5th Cir. 1968), *cert. denied,* 395 U.S. 905 (1969) ("Galveston Wharves"). (*Compare* J. Batchelder, dissenting, at 40 n.27; 49a, n.27). The panel stated that *Galveston Wharves* allowed the remedy of back pay, which was an equitable remedy, and therefore, *Galveston Wharves* would not support the view that damages are available. This distinction by the majority actually supports the allowance of the monetary recovery requested by BN in the instant case. As such, the reasoning of the majority conflicts with the Fifth Circuit's decision in *Burlington Northern. Compare Marquar,* slip op. at 43 n.3; 53a n.3, with *Burlington Northern,* 961 F.2d at 88-89.

B. The "Delicate Balance" Found by the Majority is an Unsupported Philosophical View of the RLA.

The court then noted that a "delicate balance" was created by the RLA and it was to facilitate collective bargaining

and to achieve industrial peace, citing this Court's decision in *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 47 (1979). (Slip op. at 44; 53a-54a). Though facilitating collective bargaining is certainly a purpose of the RLA, this Court has determined that the "heart" of the RLA is the prohibition against interruptions of interstate commerce or the carrier's operations. *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-78 (1969), *reh'g denied*, 394 U.S. 1024 (1969). It is hard to imagine that the availability of monetary awards for unlawful strikes could so upset this "delicate balance" as to outweigh the "heart" of the RLA.[3] This "delicate balance" is a philosophical view of the RLA which lacks any support. J. Batchelder pointed out in dissent that allowance of damages would not "upset the current balance of power between the unions and the railways any more than [this] Court's 1957 *Chicago River* decision . . . upset the balance of power that had developed during the first 31 years of the RLA." (Slip op. at 28; 34a).

Further, the majority felt that *Brown* was the linchpin to preserving this "delicate balance," because it was the only case which decided that damages were not available, and other courts had reaffirmed its basic holding. (Slip op. at 44-45; 54a-56a). *Brown*, thus, served to thwart the proper development of the law of remedies under the RLA.

Finally, the panel found that there had been no showing that a change should be made and that injunctive relief was "no longer good enough." (Slip op. at 46; 56a). The majority felt that the concerns for not upsetting the balance were still present because of the volatile atmosphere of labor-management relations. Apparently, the majority laid this "volatile atmosphere of labor-management relations" somewhat at the

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[3] The Eighth Circuit recently affirmed, under the National Labor Relations Act, a $ 21,000,000 judgment in favor of an employer against the union for breach of a no-sympathy strike clause in a collective bargaining agreement. *John Morrell & Co. v. Local Union 304A*, 913 F.2d 544 (8th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 1683 (1991).

doorstep of the union. The court stated that in this particular case, the unions could not know with certainty at the time it called the strike whether a court would later decide that the dispute was minor or major. Therefore, if the "union guessed wrong" and damages were available, the union would be liable for such damages and that would deplete the union treasury and impair its effectiveness as a collective bargaining agent. (Slip op. at 46-47; 57a). This is a rather strange concept of labor-management relations, particularly under the RLA. The union has just as much opportunity as the carrier to pursue the dispute resolution mechanism mandated by Congress to resolve minor disputes. In the particular case where the union does not wish to concede that the dispute is a minor one, it has the same ability to proceed to court for a declaratory judgment as to whether the dispute is major or minor. In effect, the majority's decision rewards a union for guessing, while at the same time punishes the carrier and the public for a union's wrong guess.

The RLA was never intended, as this Court found in *Chicago River*, to allow the union to guess in minor disputes. 353 U.S. at 34-39. There, The Brotherhood of Railroad Trainmen had argued that they were free to use the arbitral procedures for minor disputes "if they wished to [ ] but there was no compulsion on either side to allow the Board to settle a dispute if an alternative remedy, such as resort to economic duress seems more desirable" (footnote omitted). 353 U.S. at 34. This Court found that not only was the statutory language clear that the procedures were mandatory, but Congress also intended that the minor dispute procedures are compulsory and the unions agreed to concede their right to strike over minor disputes in favor of such procedures. 353 U.S. at 37-39.

C. Congress Intended the Courts to Develop the Remedies Under the RLA.

The majority closes its analysis by stating that CSX should seek Congressional change to create a damage remedy under the Railway Labor Act, because the courts have created a common law of not allowing a damage remedy. As shown

above, the majority's view of the common law is not accurate. Also, the legislative history of the Railway Labor Act reveals that the courts possess the power to use all remedies to enforce RLA provisions. As this panel unanimously found, Congress has not made any "attempt to alter the traditional presumption in favor of permitting all appropriate relief to remedy a violation of this federal right under the RLA." (Slip op. at 10-11; 13a). Therefore, it makes little sense to require the railroads to go to Congress for such a "change." *See Marquar,* dissenting opinion, slip op. 34 n.23; 42a n.23.

Further, J. Batchelder in dissent argues that the Fifth Circuit's decisions in *Brown* and *Burlington Northern* are not persuasive authority for the following reasons: (1) *Brown* confused the distinction between a right of action and a remedy, and *Burlington Northern* "fail[ed] to recognize . . . the framework . . . in *Franklin;* and (2) *Brown* mistakenly believed "that Congress must spell out all available remedies." (Slip op. at 36 and n.25; 44a, 45a and n.25). Thus, the dissent correctly notes that *Brown* and *Burlington Northern* are inadequate authority "to constitute a sufficient body of 'common law' . . . " or "to shift the burden to the party seeking damages to demonstrate why monetary damages are appropriate. . . . " (Slip op. at 38; 47a). Finally, J. Batchelder points out that the majority failed to give the railroad any opportunity to develop a factual basis to establish why monetary damages would be appropriate because the case was decided on a motion to dismiss.[4]

A conflict has now arisen between the Sixth and Fifth Circuits on whether *Franklin* applies to implied causes of action under the Railway Labor Act. Further, the majority in *Marquar* and the Fifth Circuit in *Burlington Northern* has halted the development of the law of remedies under the RLA through reliance on *Brown* and a certain philosophical view of

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[4] In *Burlington Northern,* though the case was decided on a motion to dismiss, the record reflects the parties had a full evidentiary hearing on BN's request for injunctive relief and discovery was exchanged on the damages claim.

the RLA which is unsupported by the statute or its legislative history.

CONCLUSION

The *Marquar* majority opinion reflects the continuing effect of the Fifth Circuit's decisions in *Brown* and *Burlington Northern*. The persuasive analysis in the dissenting opinion in *Marquar* demonstrates that the issue presented by BN's Petition requires this Court's immediate attention. For these additional reasons, BN's Petition for Writ of Certiorari should issue and the judgment and decision of the Fifth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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No. 91-5689

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CSX TRANSPORTATION INC., *Plaintiff-Appellant,* *v.* NEIL J. MARQUAR, MAC A. FLEMING, F.N. SIMPSON AND BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, *Defendants-Appellees.*	)	ON APPEAL from the United States District Court for the Eastern District of Kentucky

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Decided and Filed November 13, 1992

Before: JONES, GUY, BATCHELDER, Circuit Judges.

ALICE M. BATCHELDER, Circuit Judge, delivered the opinion of the court in Parts I and II, in which JONES and GUY, Circuit Judges, joined, and a dissenting opinion in Parts III, IV and V. RALPH B. GUY, JR., Circuit Judge, with whom Judge Jones concurred, delivered the opinion of the court (pp. 41-47), with respect to the issues discussed in Parts III, IV, and V of Judge BATCHELDER'S opinion.

ALICE M. BATCHELDER, Circuit Judge. Plaintiff CSX Transportation Inc. appeals the district court's decision granting a motion to dismiss for defendants, Brotherhood of Maintenance of Way Employes (BMWE or "the

union") and several union members, on the grounds that a railroad cannot obtain monetary damages under the Railway Labor Act (RLA), 45 U.S.C. §§ 151-188, for an illegal strike by the union. The majority affirms the district court and holds that monetary damages are never awardable under the RLA for a strike over a minor dispute. I, however, dissent from this holding.

I.

In September of 1990, CSX Transportation Inc. assigned part of a "stationary" track gang headquartered in Cynthiana, Ky., to perform track repairs away from its headquarters. CSX provided a truck driver to take lunch orders from gang members and bring their lunches to the job site. On September 19, 1990, defendant F.N. Simpson complained to CSX that CSX was violating the collective bargaining agreement by having these union members eat lunch on the job site instead of at the motel where the union members had been meeting each day. The union members contended that this was a "major dispute" under the RLA and that CSX was violating the RLA's status quo obligations under the RLA by changing a term of employment. CSX countered that this was a minor dispute.[1] When CSX continued to insist that it believed

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[1] The RLA requires that during a "major dispute" neither the railroad nor the union change the status quo by altering a term or condition of employment. 45 U.S.C. § 152, Seventh; § 152, First; § 156; § 160. The RLA also requires the parties to arbitrate all "minor disputes" and forbids strikes over minor disputes. *See supra* note 2 for a more detailed discussion of major and minor disputes.

this to be a minor dispute, the General Chairman of BMWE, defendant Neil J. Marquar, threatened that the union would strike.

On September 20, 1990, CSX brought suit against the BMWE and union members Mac Fleming, Neil J. Marquar and F.N. Simpson for declaratory, injunctive and compensatory relief. On September 22, 1990, the union approved a strike over the lunch dispute. On September 24, 1990, at 5 a.m., the union began a nine-state strike against CSX. That same day, at 10:35 a.m., CSX obtained a temporary restraining order, enjoining the strike. The parties then agreed to submit the dispute to arbitration as required by the RLA, and the arbitration panel upheld CSX's view that this was a minor dispute. The dispute was resolved through this arbitration process.

CSX, however, continued this action for compensatory relief. In its amended complaint filed February 11, 1991, CSX claimed that despite the swift injunctive relief, the strike had disrupted its business and delayed its trains, and also had stalled shipments to the Persian Gulf War. On May 3, 1991, the district court granted BMWE's motion to dismiss, finding that no court had allowed damages in this situation and that Congress had failed to "affirmatively approve such remedies." On appeal, plaintiff-appellant CSX contends that damages should be available under the RLA because the Supreme Court already has implied a right of action in this situation and a damages remedy is appropriate. Defendants-appellees argue that the Fifth Circuit's decisions in *Louisville & Nashville Railway Co. v. Brown*, 252 F.2d 149 (5th Cir.), *cert. denied*, 356 U.S. 949, 78 S. Ct. 913 (1958), and in *Burlington Northern Railway Co. v. Brotherhood of Maintenance Way*

Employees, 961 F.2d 86 (5th Cir. 1992), which denied damages for an unlawful strike, are controlling and that a damages remedy would disturb the balance of power between labor and management.

II.

In reviewing defendant's motion to dismiss, the standard of review that we must apply is that, "to be granted, there must be no set of facts which would entitle the plaintiff to recover. Matters outside the pleadings are not to be considered, and all well-pleaded facts must be taken as true." *Jackson v. Richards Medical Co.*, 961 F.2d 575, 577-78 (6th Cir. 1992).

As the arbitration panel found and the district court recognized, this lunch controversy constitutes a minor dispute, and therefore defendants violated the RLA by striking over a minor dispute.[2] We must determine, then,

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[2] Although the "major dispute"/"minor dispute" terminology is not used in the language of the RLA, the Supreme Court first made this distinction in *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 723, 65 S. Ct. 1282 (1945). "Minor disputes" are controversies over the meaning or application of an existing collective bargaining agreement or employment practice in a particular fact situation. *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R.*, 353 U.S. 30, 33, 77 S. Ct. 635, 637 (1957); 45 U.S.C. § 152, Sixth. If the parties cannot resolve minor disputes on their own, they are submitted to the National Railroad Adjustment Board for final resolution. 45 U.S.C. § 153, First (i) & (m). The Board has exclusive jurisdiction over minor disputes, and a party cannot bypass the Board and take the dispute into federal court, except to enforce the Board's award. *McKinney v. International Ass'n of Machinists & Aerospace Workers*, 624 F.2d 745, 748 (6th Cir. 1980). If this Board cannot resolve the dispute,

whether under the RLA a railroad may obtain money damages in this situation.

The question of whether monetary damages are available under the RLA for an illegal strike is one of first impression for this Circuit, and only one other circuit has addressed this issue. *See Burlington Northern Ry. v. Brotherhood of Maintenance of Way Employees*, 961 F.2d 86, 88-89 (5th Cir. 1992) (damages not available); *Louisville & N. Ry.*

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it goes to a referee. 45 U.S.C. § 153 (1). The RLA forbids strikes over minor disputes. *Chicago River & Ind. R.R.*, 353 U.S. at 34, 77 S. Ct. at 637.

In contrast, "major disputes" result from a disagreement in the bargaining process for a new contract or over a change in a term of an existing contract for pay, rules and working conditions. 45 U.S.C. § 152, Seventh. When a major dispute arises, neither party can alter the status quo by striking or altering pay, rules or working conditions until the parties have exhausted the negotiation and arbitration procedures set up by the RLA. *Id.* § 152, Seventh; § 155, First; § 156; § 160. These procedures include giving notice of the proposed change in pay, rules, or working conditions, 45 U.S.C. § 156; conferring about the change, *id.* § 152, Second; seeking conciliation services from the National Mediation Board, *id.* § 155; agreeing, if possible, to submit the dispute to arbitration, *id.* § 155, First; § 157; and having the President call together an emergency board to investigate whether the dispute threatens to interrupt service, *id.* § 160. If all of these negotiation steps fail, unions then may strike and management can alter the status quo. *See Detroit & T.S.L.R. v. United Transp. Union*, 396 U.S. 142, 150-53, 90 S. Ct. 294, 299-300 (1969), *limited on other gds., Pittsburgh & L.E.R.R. Co. v. Railway Labor Executives' Ass'n*, 491 U.S. 490, 109 S. Ct. 2584 (1989). Further, it has been held that if the railroad violates the status quo during a major dispute by altering the pay, rules or working conditions, the union may strike immediately before exhausting the conciliation steps. *See Detroit & T.S.L.R.*, 396 U.S. at 154, 90 S. Ct. at 301.

v. Brown, 252 F.2d 149, 155 (5th Cir.) (same), *cert. denied*, 356 U.S. 949, 78 S. Ct. 913 (1958). We find that the recent Supreme Court opinion in *Franklin v. Gwinnett County Public Schools*, 112 S. Ct. 1028 (1992), provides the framework that must govern our approach in deciding this question. Although *Franklin* does not change the existing law of implied rights and the remedies available under a statute providing those rights, it does clarify the route courts are to take in determining whether particular remedies are available under a federal statute. *Id.* at 1032-38.[3]

In *Franklin*, the Court addressed whether an implied right of action under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, supports a claim for money damages. The Court held that money damages are available under Title IX, and it indicated that once a right has been implied under a statute, courts need only decide what remedies are available under that statute. *Id.* at 1032. The Court then held:

> As we have often stated, the question of what remedies are available under a statute that provides a private right of action is 'analytically distinct' from the issue of whether such a right

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[3] Before *Franklin*, the Supreme Court and other courts at times have blurred the distinction between a "right" and a "remedy" and have used the terms interchangeably. *See, e.g., Cort v. Ash*, 422 U.S. 66, 78, 95 S. Ct. 2080, 2088 (1975). The Court acknowledged as much in *Franklin*, when it noted: "[T]he Court has recognized the power of the judiciary to award appropriate remedies to redress injuries actionable in federal court, although it did not always distinguish clearly between a right to bring suit and a remedy available under such a right." *Franklin*, 112 S. Ct. at 1032.

> exists in the first place. *Davis v. Passman*, 442 U.S. 228, 239, 99 S. Ct. 2264, 2274 (1979). Thus, although we examine the text and history of a statute to determine whether Congress intended to create a right of action, *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76, 99 S. Ct. 2264, 2274 (1979), we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise. *Davis*, supra 422 U.S., at 246-47, 99 S. Ct. at 2277-2278. This principle has deep roots in our jurisprudence.

Id. The *Franklin* Court relied on *Bell v. Hood*, 327 U.S. 678, 684, 66 S. Ct. 773, 777 (1946), in which the Supreme Court held that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Id.* The *Franklin* Court then proceeded to discuss the historical basis, dating back to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), for the "longstanding rule" that "where there is a legal right, there is also a legal remedy." *Franklin*, 112 S. Ct. at 1033 (citing *Texas & N.O.R. v. Brotherhood of Railway & S.S Clerks*, 281 U.S. 548, 569, 50 S. Ct. 427, 433 (1930); *Texas & P. Ry. v. Rigsby*, 241 U.S. 33, 39, 36 S. Ct. 482, 484 (1916); *Dooley v. United States*, 182 U.S. 222, 229, 21 S. Ct. 762, 765 (1901); and *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 624 (1838)). This presumption of the availability of all appropriate remedies has not dissipated in recent Supreme Court cases, the *Franklin* Court noted. *See Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 630 n.9, 104 S. Ct. 1248, 1252 n.9 (1984) (retroactive relief available to plaintiffs); *Davis v. Passman*, 442 U.S. 228, 247 N.26, 99 S. Ct. 2264, 2278 n.26 (1979) (federal court may order any

appropriate relief); *Cary v. Piphus*, 435 U.S. 247, 255, 98 S. Ct. 1042, 1048 (1978) (damages under § 1983); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239, 90 S. Ct. 400, 405 (1969) (statutory right "implies the existence of all necessary and appropriate remedies"); and *J. I. Case Co. v. Borak*, 377 U.S. 426, 433-35, 84 S. Ct. 1555, 1560-61 (1964) (courts have power to grant "all necessary remedial relief"). The *Franklin* Court then stated, in sweeping terms clearly applicable to any federal statute, that "[t]he general rule, therefore, is that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." *Id.* at 1035.

A.

Applying the *Franklin* framework to this case,[4] we first note that the RLA does not provide explicitly for a right of action when a union strikes over a minor dispute, and in fact it does not explicitly provide for any causes of

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[4] We do not accept appellees' argument that *Franklin's* reasoning is applicable only to civil rights statutes. The initial discussion of rights and remedies in *Franklin* uses broad language to set out general principles governing the availability of particular remedies under any federal statute. It does not restrict itself to a discussion of Title IX and other civil rights statutes. This is clear from the fact that *Franklin* discusses a long line of cases in which the Court found a remedy where there was a right, including cases such as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), which did not involve civil rights. *See Franklin*, 112 S. Ct. at 1033.

action.[5] However, the Supreme Court has implied a right of action under the RLA for a union's illegal strike. In *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U.S 30, 42, 77 S. Ct. 635, 641 (1957) [hereinafter *Chicago River*], the Court implied a cause of action under the RLA and held that an injunction was appropriate to prevent an illegal strike. In that case, the union struck against the railroad over a number of grievances involving compensation. The Court held that this was a minor dispute and that the union was bound by the "unequivocal" language in the RLA not to strike but instead to use the arbitration procedures set out in the Act. *Id.* at 34, 77 S. Ct. at 637. The *Chicago River* Court then held that "the federal courts can compel compliance with the provisions of the Act to the extent of enjoining a union from striking to defeat the jurisdiction of the Adjustment Board." *Id.* at 39, 77 S. Ct. at 640. The Court focused on why the Norris LaGuardia Act did not prohibit injunctions under the RLA and concluded that the district court " 'has jurisdiction and power to issue necessary injunctive orders [to enforce compliance with the requirements of the Railway Labor Act] notwithstanding the provisions of the Norris-LaGuardia Act.' " *Id.* at 42, 77 S. Ct. at 641 (quoting *Brotherhood of R.R. Trainmen v.*

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[5] The only right or remedy set out in the RLA is a criminal prosecution section. 45 U.S.C. § 152, Tenth. As noted in the subsequent discussion of the RLA's legislative history, the legislative history indicates that this absence of remedies was intentional because Congress intended the courts to fashion remedies to enforce the RLA. 1 *The Railway Labor Act of 1926 – A Legislative History*, at 235, 282-84 (1988).

Howard, 343 U.S. 768, 774, 72 S. Ct. 1022, 1025 (1952)).[6] This implied right of action created in *Chicago River* exists under the RLA although the statute is silent as to any such right.

According to *Franklin*, because the Supreme Court has already implied a right of action under the RLA where the union conducts or threatens an illegal strike, we need not undertake an analysis, using the line of Supreme Court cases discussing implied rights,[7] of whether to imply a right of action in this situation before

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[6] The Supreme Court has also authorized injunctions under the RLA in other contexts. *See, e.g., Texas & N.O.R. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 569, 50 S. Ct. 427, 433 (1930) (injunction appropriate for interference with employees' organizational rights: "As the prohibition was appropriate to the aim of Congress, and is capable of enforcement, the conclusion must be that enforcement was contemplated.")

[7] In a series of cases, the Supreme Court has discussed implied rights of action and the remedies available under those rights. *See Texas & P. Ry. v. Rigsby*, 241 U.S. 33, 36 S. Ct. 482, 484 (1916) (setting out expansive test for implying rights); *Cort v. Ash*, 422 U.S. 66, 78, 95 S. Ct. 2080, 2087 (1974) (limiting test for implying rights); *Merrill, Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 378, 102 S. Ct. 1825, 1839 (1982) (refining *Cort* by focusing on congressional intent); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76, 99 S. Ct. 2479, 2489 (1979), and *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 18, 23-24, 100 S. Ct. 242, 249 (1979) (restricting rights-creating approach applied in the earlier cases). *See also Franklin*, 112 S. Ct. at 1039 (Scalia, J., concurring), and *Thompson v. Thompson*, 484 U.S. 174, 189, 108 S. Ct. 513, 524 (1988) (Scalia, J., concurring) (arguing that the Court in effect has overruled *Cort v. Ash* with *Touche Ross* and *Transamerica* cases).

addressing the issue of damages.[8] Rather, because an implied cause of action already exists under the RLA in this situation, *Franklin* dictates that we presume that all "appropriate" remedies are available "unless Congress

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[8] In *Kaschak v. Consolidated Rail Corp.*, 707 F.2d 902 (6th Cir. 1983), a panel of this Court addressed whether a right existed under the RLA permitting damages in the context of a minor dispute over a wrongful discharge. There, we did not focus on the distinction between rights and remedies but implied that once a right has been created, the only issue is whether a particular remedy is an appropriate means for enforcing the right. *Kaschak* held:

> We do not feel, however, that a remedy need be implied in this case; the unique nature of the RLA relieves us from having to go that far. As noted, the RLA is quasi-contractual in nature, creating legally enforceable obligations enforceable by whatever means appropriate. Our inquiry regarding Board jurisdiction only requires that we ask to what extent the statute itself has defined the appropriate means for enforcing a limited class of these obligations. The only question under the RLA is *where* an existing remedy may be enforced.

Id. at 909 n.13.

This language makes clear that in *Kaschak* we found that the quasi-contractual nature of the RLA made it unnecessary to imply a right in that situation. We found the RLA to be quasi-contractual because the statute arose from an agreement between labor and management that Congress and the President later ratified. Although *Kaschak's* quasi-contract analysis may provide another reason why we need not imply a cause of action for an illegal strike, here we do not need to base an implied cause of action for an illegal strike on quasi-contract principles because the Supreme Court already has explicitly created a cause of action in this situation in *Chicago River*, 353 U.S. at 42, 77 S. Ct. at 641.

has expressly indicated otherwise." *Franklin*, 111 S. Ct. at 1032.

B.

In determining whether Congress has expressly intended to limit the presumption that all appropriate remedies are available under the RLA, *Franklin* instructs that ordinarily it is futile to resort to the traditional statutory interpretation tools of examining the text and legislative history of a statute because Congress usually has not spoken about remedies under a right that the Supreme Court, rather than Congress, created. *Franklin*, 112 S. Ct. at 1035 ("usual recourse to statutory text and legislative history . . . will not enlighten our analysis"). Instead, *Franklin* mandates that we "evaluate the state of the law when the legislature passed [the RLA]" to determine whether Congress intended to limit the presumption in favor of all appropriate relief. *Franklin*, 112 S. Ct. at 1036.

At the time of the RLA's enactment in 1926, the Supreme Court "regarded the denial of a remedy as the exception rather than the rule." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 375, 102 S. Ct. 1825, 1837 (1982) (noting that the broad approach laid out in *Texas & Pacific Railway v. Rigsby*, 241 U.S. 33, 36 S. Ct. 482 (1916), prevailed up to the 1975 decision in *Cort v. Ash*, 422 U.S. 66, 95 S. Ct. 2080 (1975)). It was in this context that Congress passed the RLA without stating any intent to abandon the traditional presumption in favor of all available remedies. *See Franklin*, 112 S. Ct. at 1036 (noting context in which Congress passed Title IX). Even after the Supreme Court created an implied right of

action under the RLA in *Chicago River*, 353 U.S. at 42, 77 S. Ct. at 641, Congress although aware of this decision, amended the RLA in 1966 and made additional changes in 1970, but never indicated that any particular remedy was not appropriate to compensate for a strike over a minor dispute. Pub. L. No. 89-456, §§ 1, 2, 80 Stat. 208, 209 (1966); Pub. L. No. 91-234, §§ 1-6, 84 Stat. 199, 200 (1970).[9] Therefore, it is clear that Congress made no attempt to alter the traditional presumption in favor of permitting all appropriate relief to remedy a violation of this federal right under the RLA. Thus, we must presume that all appropriate remedies are available, and accordingly we have the power to enforce the RLA through "whatever

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[9] Defendants-Appellees argue that when amending the RLA, Congress had the opportunity to permit damages, but "specifically declined to create such a cause of action." Appellees' Brief at 34. However, *Franklin* makes clear that silence is not enough to preclude a remedy under an implied cause of action. Instead, Congress must expressly state that damages are not permitted. *Franklin*, 112 S. Ct. at 1035. Congress has not done so.

Defendants-Appellees also argue that the Labor Management Relations Act (LMRA); 29 U.S.C. §§ 185 & 187, permits monetary damages for unlawful strikes, but specifically exempts the RLA from application of these provisions. Appellees' Brief at 34. Section 182 states:

> The provisions of this subdivision shall not be applicable with respect to any matter which is subject to the provisions of the Railway Labor Act, as amended from time to time.

29 U.S.C. § 182. While this provision clearly states that the damages provision of the LMRA does not apply to the RLA, this passage cannot be used to show by negative implication that Congress expressly indicated that no monetary damages are available under the RLA.

appropriate means might be developed." *Chicago & N.W. Ry. v. United Transp. Union*, 402 U.S. 570, 577, 91 S. Ct. 1731, 1735 (1971).

C.

As noted above, the Supreme Court pointed out in *Franklin* that legislative history ordinarily is not helpful in determining what remedies are available under a federal statute from which the courts already have implied a right of action. However, this is not the usual case where because the statute itself "supported no express right of action, it is hardly surprising that Congress also said nothing about the applicable remedies for an implied right of action." *Franklin*, 112 S. Ct. at 1038. Instead, the RLA presents a case in which the legislative history speaks directly to Congress's intent that this statute create rights for which the courts would fashion a whole spectrum of remedies. The RLA's legislative history reveals that the right "implied" by the Supreme Court in *Chicago River* to resort to the courts in the event of illegal strikes clearly was contemplated by Congress when it enacted the RLA. In fact, the legislative history indicates that Congress deliberately did not include in the RLA's provisions any enforcement mechanisms or remedies, intending instead that the courts would develop the law as to its enforcement with all available remedies. Thus, although ordinarily we must presume that Congress intended the full range of remedies once the courts imply a right, *Franklin*, 112 S. Ct. at 1035, here we need not rely only on presumptions because we have clear evidence that Congress intended to create such a right of action and that it intended the courts to enforce it with all

available remedies. The RLA, therefore, presents the very strongest case for finding that a full range of remedies is available.[10]

It is clear from the legislative history that Congress did not intend to fashion any remedies in the RLA itself, but instead intended that the courts would decide what remedies were necessary to enforce the RLA. *See* 1-4 *The Railway Labor Act – A Legislative History* (1988) [hereinafter

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[10] Justice Scalia, in his concurring opinion in *Franklin*, criticized the approach taken by the majority in that case, noting, "[W]hat the Court's analytical construct comes down to is this: Unless Congress expressly legislates a more limited remedial policy with respect to rights of action it does not know it is creating, it intends the full gamut of remedies to be applied." *Franklin*, 112 S. Ct. at 1039.

We believe that the RLA, however, presents the very case to which Justice Scalia's sensible observation does not apply. In enacting the RLA, Congress intended that although it had declined to expressly create rights of action under the statute, the courts could, and should, fashion the full gamut of remedies. We note as well that this case is not one in which resort to legislative history is had to "interpret" that which is clear and unambiguous in the language of the statute itself. A study of the legislative history of the RLA, and particularly of the floor debates surrounding its adoption, reveals that Congress, by design, left to the courts the development of the law of enforcement of the statute, both as to the rights of action created under the statute and the remedies for violations of those rights. That being the case, we are required to review that history carefully to determine the breadth of remedies available to vindicate the right which the Supreme Court has already implied under the statute.

Legislative History].[11] In answering how the RLA was to be enforced, Representative Newton of Minnesota responded:

> [I]t is our understanding from the hearings that the parties have agreed in the main upon a procedure whereby these boards will be established. Now, then, if one party to the dispute shows no inclination whatever to carry out the

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[11] Mr. Richberg, attorney for the labor organizations, stated:

> We have avoided in the bill in any way of getting up any penalty sections or any sections for the invocation of any judicial authority except in the enforcement of an arbitration award, the thought being this, that so far as this law stated duties imposed upon the parties by act of Congress, if they failed to live up to their duties, and there was any action which a court could take, consistent with the judicial powers and its limitations, to compel the enforcement of that duty as a legal obligation, it would be subject to enforcement. But the law for such enforcement or compulsions should be developed in the courts, according to the old common-law theory of letting the courts develop the law after the obligations are clearly understood, rather than to write into the law a specific line of penalties and writs of enforcement.
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> I think if either party showed a willful disregard of the fundamental requirements, that they should make every reasonable effort to make an agreement – in other words, if they refuse absolutely to confer, to meet or discuss or negotiate I think there is a question as to whether there might not be invoked some judicial compulsion, but I would rather see that left to development rather than see it written into the law.

Legislative History, supra, at 283-84.

> terms and provisions of this act there is a violation of a very important legal obligation that is laid down in the law, and that is enforcible [sic] in the courts.

Legislative History, supra, at 282-83. The dialogue continued:

> MR. NEWTON of Minnesota: . . . That is, there is no compulsion to do or not to do specific acts; but there are imposed upon the parties, in the interests of the public and the maintenance of uninterrupted service, certain duties. The violation by either party of these duties would call for appropriate action in the courts of law and equity by the aggrieved party or the public.
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> MR. SPROUL of Kansas: In what way? Where is there any such provision?
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> MR. NEWTON of Minnesota: Through the theory of the common law. The duties are laid down. The law for enforcement would be developed in the courts after the obligations are made and understood.
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> . . .
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> MR. GARRETT of Tennessee: . . . Does the gentleman mean that the matter to which we have just been referring can be enforced now by mandatory injunction?
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> MR. NEWTON of Minnesota: I mean that there are obligations imposed by this bill upon both carrier and employee; that these obligations can be enforced in the law and equity courts just the same as other obligations and duties are enforceable in those courts. . . .

Legislative History, supra, at 283 (House Debate, February 24, 1926).[12] The legislative history also indicates that the parties intended for the anti-strike and anti-lockout provisions of the RLA to be reciprocal obligations,[13] and

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[12] *See also Legislative History, supra,* at 284, discussing the availability of damages in court when a party violates an award or agreement reached through the RLA's conciliatory and arbitration provisions:

> MR. LAGUARDIA: According to the gentleman, after an agreement has been reached and made a part of the record, then either party may resort to law for damages for violation or to equity for specific performance?
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> MR. NEWTON of Minnesota: Exactly. They may resort to any remedy open in the courts of law or equity.
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> . . .
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> MR. LAGUARDIA: I mean after an agreement has been entered into and made a record of the court as is provided in this bill. Then if there is any disobedience or noncompliance with the provisions of that agreement, the gentleman means to say that the railroad may go into a court of equity and require specific performance?
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> MR. NEWTON of Minnesota: I have not given thought to that particular provision about specific performance but every legal right that inures in the common law could be made use of here to enforce these specific obligations that are laid upon the parties. . . . If he [the aggrieved party] failed there is not any question but that there would be open to the aggrieved party whatever right there might exist under the principles of law and equity for a violation of the agreement.

[13] Now, I have said very clearly, and I want to repeat it, that I have no question but that this imposes the obligation not to carry on any strike movement, not to

therefore presumably enforceable by both parties. Although the congressional debate included a discussion of other remedies available for strikes, including contempt[14] and injunctions,[15] it also indicated that damages would be available to an aggrieved party, at least in the case of the union striking over a dispute after an agreement or award had been reached through the RLA's conciliatory provisions or striking over a major dispute before the RLA's provisions have been exhausted.

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call a strike – that is, not to have the men suspend work and imposes upon the employer precisely the same obligation that he shall not begin picking off men and discharging them in order to disintegrate the forces; and I think those are equally balanced obligations.

Legislative History, supra, at 292 (quoting Mr. Richberg, attorney for the unions, House hearings, at 276-77).

[14] MR. CUMMINS: . . . But I think the judgment might very well be one which would restrain a conspiracy in the nature of a concerted abandonment of employment that would suspend or interfere substantially with transportation.

MR. REED of Pennsylvania: In other words, a strike would be a contempt of court?

MR. CUMMINS: It might be. That is to say, I think that under this bill there could be a judgment rendered upon an award which would make a strike a contempt of court.

Legislative History, supra, at 526.

[15] MR. WHEELER: . . . [I]n this bill labor has conceded practically, and in my judgment absolutely, the power of the Government to go into court and use the injunction in labor disputes.

Legislative History, supra, at 560.

> MR. WHEELER: They have simply said in so many words, practically, that after the 60 days provided, if they violate any of the provisions, the roads can go into court and get an injunction against them. They have offered to have any award of this board entered as a judgment in the courts of the country, and if they violate the provisions of the award, under the decisions of the Supreme Court the roads can sue them in damages.

Legislative History, supra, at 549-50. Later Senator Wheeler commented:

> [I]n the event that a strike is threatened or a dispute arises under this bill, the men agree not to go on a strike for 60 days, while the whole question is being thrashed out in its different stages; and if they attempt to go on a strike, if the men should violate the law in any respect, then the railroads and the Government would have the right to go into court and get out an injunction to prevent them from going ahead with the strike. If the men violate the provisions of this law, the railroads or the Government can go in and sue the unions for a violation of their contracts and take away from them the money that they have saved in their treasuries. Not only that, but after they have finally come to an agreement it is made binding upon the parties by making it a court record.

Id. at 559.

Thus, the legislative history indicating Congress's intent that the courts would enforce the RLA with all available remedies, as well as the *Franklin* presumption of the full range of remedies, indicate that we have the

power to enforce the RLA with any appropriate remedy. We note that the right of action implied by the Supreme Court in *Chicago River* was to enforce compliance with the RLA. That right of action is not merely for the specific remedy provided in that case – injunctive relief – but a general right of action that can be enforced with any appropriate remedy.

III.

The only question, then, is whether a damages remedy is appropriate to compensate a railroad for a union's illegal strike over a minor dispute. The district court disposed of this case on a motion to dismiss because it believed that damages can never be appropriate in such a situation. Accordingly, the district court did not examine the particular facts surrounding this case. The majority affirms this result. I, however, would reverse the district court's granting of the motion to dismiss for the reasons outlined below. I would hold that there may be circumstances in which a railway could recover damages from a union for an illegal strike over a minor dispute. Because the appropriateness of a remedy must be determined on a case-by-case basis, I would remand the case to the district court to deny the motion to dismiss and to permit discovery and the factual development necessary to permit the district court to determine whether damages are appropriate in this case.

A.

A brief overview of the RLA is useful in examining the appropriateness of a damages remedy for an unlawful

strike. The RLA was passed in 1926 as a joint effort of labor and management that was ratified by Congress and the President. *Chicago & N.W. Ry. v. United Transp. Union,* 402 U.S. 570, 576, 91 S. Ct. 1731, 1735 (1971). The RLA was the result of "prolonged conferences between representative Committees of railroad presidents and of executives of railroad labor organizations, and embodied an agreement of a large majority of both." *Texas & N.O.R. v. Brotherhood of Ry. & S.S. Clerks,* 281 U.S. 548, 563, 50 S. Ct. 427, 431 (1930) (private right and remedy of injunction available to prevent interference with organizational rights). Representative Denison stated during the House debate prior to the RLA's enactment:

> The railroads and their employees were invited by the President to reach an agreement. They have compromised their differences and have presented their agreement to Congress, and we are asked to examine it and either approve it or reject it.

Legislative History, supra, at 312.[16] Later, Representative Robinson of Kentucky stated: "The purpose of this act is

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[16] Both sides believed that they had compromised to form the contract that would become the RLA. "The railroad employees are giving up more under this bill than they have ever given up before in the history of the country." *Legislative History, supra,* at 538 (Senator Wheeler). Senator Wheeler later noted: "The executives of the railroad organizations . . . have gone further in this bill in giving away the rights to which they are entitled under the Constitution than any other labor organization in this country has ever done . . . " *Id.* at 550. And, Senator Cummins stated:

> Both railway executives and railway employees have pledged themselves, so far as men can be pledged under such circumstances, to a due observance of the

to ratify and put the stamp of approval of Congress on the agreement entered into between the railroads and their workers to insure peace in this great industry and uninterrupted operation of the railroads." *Id.* at 384. In 1936, the RLA was amended to cover "common carrier[s] by air engaged in interstate or foreign commerce" and "carrier[s] by air transporting mail for or under contract with the United States Government." 45 U.S.C. § 181.

The RLA has five stated purposes:

> (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein;
>
> (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization;
>
> (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter;
>
> (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions;
>
> (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application

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> provisions of the pending bill. It is the child of their joint negotiations, consultations, and deliberations. It has not been imposed upon them ab extra. It is to a very considerable degree, though perhaps not altogether, the offspring of their own unbegrudging volition.

Id. at 700.

> of agreements covering rates of pay, rules, or working conditions.

45 U.S.C. § 151a. The Supreme Court, however, has held that Section 2, First, 45 U.S.C. § 152, First is "the heart" of the RLA. *Chicago & N.W. Ry.*, 402 U.S. at 574, 91 S. Ct. at 1734. That section obliges the parties "to exert every reasonable effort to make and maintain agreements concerning rate of pay, rules, and working conditions and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." *Id.*; 45 U.S.C. § 152, First. The importance of preventing interruptions in service was emphasized in the congressional debate preceding the enactment of the RLA. For example, Mr. Newton commented:

> In this situation the parties have been unable to agree. They are in disagreement, but under this plan which has been agreed to they agree to maintain the status quo. And, gentlemen of the House, this will give the public more rights and will do more to enable them to maintain continuous, uninterrupted transportation upon a disagreement and deadlock then any other provision that has been written into law.

Legislative History, supra, at 291.[17] Although the RLA seeks to benefit the public by providing uninterrupted

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[17] In the Senate debate, Senator Wheeler stated:
[T]he people of the country have been crying for the last 15 years for arbitration and wanting the railroads and their employees to get together. That is what we have been trying to do. We have been trying to avoid strikes and have them get together and settle their differences.

service, Congress also intended that both the railroads and the unions be beneficiaries of the Act. This is clear from the RLA's language, which states that the Act is intended to avoid "any interruption to commerce *or* to the operation of any carrier . . . " and to guarantee "freedom of association" to employees and "complete independence" as to self-organization for carriers and employees. 45 U.S.C. § 151a (emphasis added). *See also* 45 U.S.C. § 152, First (duty designed to avoid interruption to "commerce or to the operation of any carrier . . . ").

As noted earlier, the RLA seeks to avoid interruption of service by requiring that all "minor disputes"[18] over interpretation of the bargaining agreement first be submitted to the parties' grievance process and, if that does not resolve the matter, then be submitted to a Board of Adjustment.[19] Strikes over minor disputes are prohibited

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Legislative History, supra, at 538. Later in the debate, Senator Fess commented: "But this Nation could not exist if transportation stopped, for people would starve and freeze. Transportation is absolutely essential, and for that reason the public has a paramount interest in it and all of our legislation must reflect that particular item." *Id.* at 564.

[18] See *supra* note 2 for a discussion of major and minor disputes.

[19] The RLA's text reads:

> All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

45 U.S.C. § 152, Second.

> The disputes between an employee or group of employees and a carrier or carriers growing out of

under the RLA. *Chicago River,* 353 U.S. at 34, 77 S. Ct. at 637.

B.

It is important to examine the nature of the claim that CSX asserts here. CSX does not merely seek damages for a minor dispute, but instead seeks damages resulting from the union's unlawful strike over a minor dispute. In fact, the lunch dispute itself was later submitted to arbitration and resolved there as required by the RLA. CSX's claim then, cannot be equated with an attempt to bypass the RLA's arbitration procedures and take a minor dispute into federal court in order to get relief not available in the arbitration process. Such an attempt to bypass the RLA's procedures clearly would be impermissible. *McKinney v. International Ass'n. of Machinists & Aerospace Workers,* 624 F.2d 745, 748 (6th Cir. 1980) (Board has exclusive jurisdiction over minor disputes).

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grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes. 45 U.S.C. § 153, First (i).

Neither are the circumstances surrounding the CSX claim analogous to the circumstances in *Kaschak v. Consolidated Rail Corp.*, 707 F.2d 902, 906 (6th Cir. 1983), where a panel of this Court indicated that the arbitration procedures could be bypassed in favor of the federal courts "where the [arbitration] requirement would prevent the fashioning of an adequate remedy." *Id.* at 906-07 (citing *Czosek v. O'Mara*, 397 U.S. 25, 90 S. Ct. 770 (1970)). In *Kaschak*, plaintiff tried to comply with the RLA's conciliation procedures by filing a grievance with the union after he was discharged by his employer, Conrail. The union, however, failed to process the grievance within the time limits of the bargaining agreement, and thus the grievance could not be reviewed by the Board of Adjustment. *Kaschak*, 707 F.2d at 903. Plaintiff then filed suit against his employer in federal court. The *Kaschak* Court held that plaintiff's grievance could be reviewed in federal court because the grievance was untimely and resort to the Board of Adjustments would have been futile:

> While there is not doubt that an employee may not opt to have his minor dispute resolved before a court rather than the Board, that is *not* the situation which Kaschak's claim presents to this court. Kaschak contends that he never had the chance to choose between the Board and the district court. Rather, he claims that he requested the Union to present his grievance to the Board and that the time for individual resort to the Board passed while he was relying on the Union to represent him.

Id. at 908. The *Kaschak* court, then, permitted the plaintiff to come to federal court despite the RLA's conciliatory provisions only because the union, one of the players

under the RLA scheme, frustrated the RLA's process so that it could not have worked for this plaintiff.

In contrast, the claim that CSX makes here is not the kind of claim which could be heard by Adjustment Board arbitrators. That Board is only charged with handling minor disputes by interpreting collective bargaining agreements and making awards, not with enforcing the RLA's provisions. *Chicago & N.W. Transp. Co. v. Railway Labor Executives' Ass'n*, 908 F.2d 144, 156 (7th Cir. 1990) (arbitrators' task is only contractual interpretation), *cert. denied*, 111 S. Ct. 1073 (1991). A claim of damages to remedy an illegal strike would not bypass the conciliation methods for minor disputes set up by the RLA. Instead, CSX's claim arises from the union's intentional refusal to follow the RLA's mandate to submit minor disputes to arbitration, with the result that CSX was put in the position of having no recourse against the strike unless it could bring an action in federal court. Therefore, because the RLA's arbitration procedures were not designed to provide a remedy for damages resulting from a union's illegal strike, the RLA's goals cannot be vindicated unless judicial remedies are provided. *See United Indus. Workers of Seafarers Int'l Union v. Board of Trustees of Galveston Wharves*, 400 F.2d 320, 327 (5th Cir. 1968) (Board had no jurisdiction because "a minor dispute is not involved. This is not a grievance, nor a matter of interpretation or application of a collective bargaining agreement."), *cert. denied*, 395 U.S. 905, 89 S. Ct. 1747 (1969) [hereinafter *Galveston Wharves*.] In this situation, where the Board of Adjustment can neither prevent nor compensate for the damage caused by an illegal strike, the RLA's anti-strike provisions can only be enforced through the federal

courts. *See Steele v. Louisville & N. R.*, 323 U.S. 192, 207, 65 S. Ct. 226, 234 (1944).

C.

The appropriate means of enforcing a right under the RLA must be determined on a case-by-case basis. In *Kaschak*, 707 F.2d at 906, a panel of this Court noted:

> The Supreme Court has repeatedly addressed the issue and determined that the provisions of the RLA are more than mere exhortations to the parties, creating legal obligations enforceable by whatever means appropriate . . .
>
> The question remaining is which are the appropriate means for the enforcement of the obligations which have been created between Conrail, the Union and Kaschak. Generally, the propriety of the means of enforcement is to be determined on a case-by-case basis.

Id. at 906 (citations omitted). In light of *Kaschak's* reasoning, I would not hold, as the majority does, that there can be no case in which a damages remedy is both appropriate and necessary to enforce the RLA's prohibition against illegal strikes.

In *Chicago River*, the Supreme Court permitted enforcement of the RLA's goals through injunctions against illegal strikes over minor disputes. *Chicago River*, 353 U.S. at 34-36, 77 S. Ct. at 637-38. The Court held that an injunction was necessary to make effective the "unequivocal" language requiring that the Board of Adjustment handle minor disputes that have not been resolved by the parties. *Id.* at 34, 77 S. Ct. at 637. The

traditional rule is that "courts should determine the adequacy of a remedy in law before resorting to equitable relief. Under the ordinary convention, the proper inquiry would be whether monetary damages provided an adequate remedy, and if not, whether equitable relief would be appropriate." *Franklin*, 112 S. Ct. 1038 (citing *Whitehead v. Shattuck*, 138 U.S. 146, 150, 11 S. Ct. 276, 276 (1891)). Because in *Chicago River* the Supreme Court held that an equitable remedy was appropriate for an illegal strike under the RLA, it first must have considered whether monetary damages provided an adequate remedy and concluded that they did not.

Here, too, the district court correctly determined that CSX's request for an injunction to stop a strike over a minor dispute was appropriate pursuant to *Chicago River*. In doing so, the district court could only have issued an injunction because damages did not provide an adequate remedy; damages could not prevent the strike from occurring, and the strike, resulting in the interruption of service, constitutes the damage to a railroad. However, merely because an award of damages was found to be inadequate, and thus the injunction was appropriate to stave off the harm that damages could not have prevented, does not mean that damages are not an appropriate remedy to compensate for the strike and deter further strikes. *Cf. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 405, 91 S. Ct. 1999, 2009 (1971) (because equitable relief is appropriate without explicit congressional authorization, "it seems to me that the same statute is sufficient to empower a federal court to grant a traditional remedy at law.") (Harlan, J., concurring).

As in *Franklin*, here equitable relief may not be sufficient in itself to enforce the RLA's goals or afford CSX an adequate remedy. *See Franklin*, 112 S. Ct. at 1038. The Supreme Court has held that Section 2, First is the "heart" of the RLA in that it requires parties to "exert every reasonable effort to . . . settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute. . . . " *Chicago & N.W. Ry.*, 402 U.S. at 574, 91 S. Ct. at 1734 (quoting 45 U.S.C. § 152, First). The RLA provides for "the more effectual protection of interstate commerce from interruption to such a degree as to deprive any section of the country essential transportation services . . . [T]he brotherhood insists, and we think rightly, that the major purpose of Congress in passing the Railway Labor Act was 'to provide a machinery to prevent strikes.' " *Texas & N.O.R. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 565, 50 S. Ct. 427, 432 (1930). Here the union sidestepped the "machinery to prevent strikes" by striking illegally. Although CSX obtained an injunction the same day that the strike began, it did not obtain the injunction in time to prevent interruption of service. Therefore, it appears that the RLA's primary goal of avoiding interruptions in rail service cannot be carried out in every instance using only injunctive relief. In conjunction with injunctive relief, the availability of monetary relief could help deter strikes over minor disputes and make effective the RLA's prohibition against interruptions in service over minor disputes. *See Galveston Wharves*, 400 F.2d at 326 ("Back pay is a realistic assurance that there will be 'an impact on the duty to bargain to prevent the employer from getting a windfall from having violated the Act.' ") And, injunctive

relief only prevents further damage to a railway from a strike, but does nothing to restore the railway to the position where it was before the union's illegal strike. *Id.* (Backpay "will put the employees 'substantially in same position as if Galveston Wharves had complied with the Act.' ") Although at this stage of the proceedings it is unclear what damage, if any, CSX actually suffered, it may be that CSX cannot be compensated adequately for the losses incurred from the illegal activity without monetary damages. Thus, CSX's relief may not be complete without a monetary damages remedy.

D.

The union argues, and the majority concurs, that permitting damages today may upset the balance of power that has developed over the years between labor organizations and railways under the RLA. Because the RLA was bargained for by labor and railways long ago and, until now, no monetary damages have been awarded to remedy illegal strikes, the majority worries that to provide such damages now is to risk upsetting this bargained-for relationship between the parties. I disagree.

In *Kaschak*, a panel of this Court commented on "the unique history behind the RLA."

> Though formulated as a piece of federal legislation, "it was, and was acknowledged to be, an agreement worked out between management and labor, and ratified by the Congress and the President." The provisions of the RLA are, thus, enforceable as quasi-contractual obligations, even absent a § 301-like provision saying so.

707 F.2d at 906. The quasi-contractual nature of the RLA[20] argues against the union's balance of power argument and in favor of a damages remedy for two reasons.

First, damages are typically available under a contract, and thus damages could be appropriate to enforce this joint effort of labor and management. Second, both labor and management bargained for the provisions of the RLA and thus should be bound by them as parties to the quasi contract. In 1934, Section 3, First was added to the RLA, creating the National Railroad Adjustment Board and making it compulsory for minor disputes to be resolved by the Adjustment Board. 45 U.S.C. § 153, First. As noted in *Chicago River*, 353 U.S. at 37-39, 77 S. Ct. at 639, "The change was made with the full concurrence of the national railway labor organizations." *Id.* As noted

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[20] *Kaschak*, in referring to the quasi-contractual nature of the RLA, apparently was not referring to "quasi contract" in the traditional legal sense. The legal definition of "quasi contract" is: "[a]n obligation which law creates in absence of agreement; it is invoked by courts where there is unjust enrichment." *Black's Law Dictionary*, at 1120 (5th ed. 1979). The *Kaschak* court, though, was referring to the fact that the RLA was the agreement between labor and railway management and subsequently ratified by Congress. In that context, "quasi" is used as it is defined generally: "as if; in a sense or manner; seemingly; in part." *Webster's New World Dictionary*, at 1163 (1972). The "quasi-contract" *Kaschak* was referring to is "almost a contract." *Kaschak* was focusing on the unique nature of the RLA and the fact that the legislation was like a contract between labor and management in that the two sides had agreed to the provisions of the RLA before it ever went to Congress and the President for ratification.

earlier, the chief spokesman for the railway labor organization at that time stated: "[W]e are now ready to concede that we can risk having our grievances go to a board and get them determined, and that is a contribution that these organizations are willing to make." *Id.* The Supreme Court added, "[T]here was general understanding between both the supporters and the opponents of the 1934 amendment that the provisions dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited field." *Id.* at 39, 77 S. Ct. at 640. Therefore, from the very beginning, labor understood that minor disputes must go to the Adjustment Board and not result in strikes. It is not unfair, then, to permit damages against the union for violating this agreement to arbitrate in which it acquiesced more than four decades ago.

To hold that monetary damages may be an appropriate remedy for an illegal strike will not upset the current balance of power between the unions and the railways any more than the Supreme Court's 1957 *Chicago River* decision permitting injunctive relief as a remedy for an illegal strike upset the balance of power that had developed during the first 31 years of the RLA. In addition, other courts have found that damages or monetary equitable relief are appropriate under the RLA in different contexts without upsetting the balance of power. These situations include: 1) damages against unions and for employees over a union's breach of the duty of fair representation, *Steele v. Louisville & N.R.*, 323 U.S. 192, 234, 65 S. Ct. 226, 234 (1944) (RLA's purposes carried out by damages remedy for discriminatory representation),

and *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, Ocean Lodge* 76, 323 U.S. 210, 213-14, 65 S. Ct. 235, 237 (1944) (same); 2) damages or backpay against railways or carriers and for employees, *Burke v. Compania Mexicana De Aviacion*, 433 F.2d 1031, 1034 (9th Cir. 1970) (implying right to damages under § 2, Fourth for wrongful discharge); *Belton v. Air Atlanta, Inc.*, 647 F. Supp 28 (N.D. Ga. 1986) (punitive damages may be awarded against employer for interfering with employees' attempts to organize); *Brown v. World Airways, Inc*, 539 F. Supp. 179 (S.D.N.Y. 1982) (damages demand against airline not struck in case involving employer's discharge of plaintiff for union organization activities); *Adams v. Federal Express Corp.*, 470 F. Supp. 1356 (W.D. Tenn. 1979) (backpay available to employee for wrongful discharge), *Aff'd*, 654 F.2d 452 (6th Cir. 1981); *Brady v. TransWorld Airlines*, 223 F. Supp. 361, 370 (D. Del. 1963) (damages available for wrongful discharge under RLA), *aff'd*, 401 F.2d 87 (3d Cir. 1968), *cert. denied*, 393 U.S. 1048, 89 S. Ct. 680 (1969); and 3) damages or backpay for unions and against railways or carriers, *Bangor & A. R. v. Brotherhood of Locomotive Firemen & Enginemen*, 442 F.2d 812, 817 (D.C. Cir. 1971) (union not entitled to damages for amount railway saved when it failed to hire firemen that would have been hired absent blanking practice because this amount was speculative, but union received damages from railway for dues, assessments, initiation fees and other payments additional firemen would have made); *Galveston Wharves*, 400 F. 2d at 320 (backpay appropriate for union for employees laid off when employer violated status quo). *Cf. United Transp. Union v. Florida East Coast Ry.*, 586 F.2d 520, 525 (5th Cir. 1978) (statute of limitations

applied because union's claim for monetary damages for abrogating the collective bargaining agreement was legal claim.).

In addition, both railroads and unions have been permitted damages as part of the negotiation and arbitration processes set up by the RLA to resolve minor disputes. *See McKinstry Co. v. Sheet Metal Workers' Int'l Ass'n.*, 859 F.2d 1382, 1384 (9th Cir. 1988) (adjustment board awards union $19,000 in damages); *Local 553, Transport Workers Union of America v. Eastern Air Lines Inc.*, 695 F.2d 668, 675 (2d Cir. 1982) (adjustment board "can interpret contract clauses and award monetary damages"); *Brotherhood of R.R. Trainmen v. Denver & R. G. W. R.*, 370 F.2d 833, 836 (10th Cir. 1966) (Board awarded $472,000 to union members and against railway; court upheld constitutionality of RLA amendment making adjustment board's order to pay money damages unreviewable), *cert. denied*, 386 U.S. 1018, 87 S. Ct. 1375 (1967). In a case where a railway seeks damages to redress an illegal strike that frustrated the RLA's primary goal of avoiding service interruptions, damages may be even more appropriate and necessary than in the cases cited above in which damages were sought merely as a remedy for a minor dispute.

The majority further contends that permitting a damages remedy will deter legitimate strike activity by labor organizations. The majority fears that legitimate strikes over major disputes, arising when the union believes that the railroad has violated the status quo, may be deterred out of fear that the controversy eventually will be determined to be a minor dispute and the union would, as a result, be subject to damages. Although strikes are never

permissible over minor disputes and generally are permissible over major disputes only if the RLA's conciliation steps have been exhausted, it has been held that the union may strike over a major dispute immediately if the railroad violates the status quo first and has not restored the status quo before the strike. *See Detroit & T.S.L.R. v. United Transp. Union*, 396 U.S. at 154, 90 S. Ct. at 301 ("The union undoubtedly felt it could resort to self-help if the railroad could, and, not unreasonably, it threatened to strike."); *Atlanta & West Point R. Co. v. United Transp. Union*, 439 F.2d 73, 80 (5th Cir. 1971) (" 'the Union had the right to strike; that right continues until the Act is complied with by the Carrier . . . ' ") (*quoting Galveston Wharves*, 400 F.2d at 333), *cert. denied*, 404 U.S. 825, 92 S. Ct. 53 (1971).

A holding that monetary damages may be appropriate to remedy an illegal strike would have no greater chilling effect on the unions' legitimate strike activity than the availability of monetary damages against the railroads for violations of the status quo would have on legitimate activity by the railroads. The RLA's provisions impose reciprocal obligations on unions and management, and nothing in such a holding implies that monetary damages are not available to the union as well as to the railroads to remedy violations of those obligations. *See, e.g., Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas Ry.*, 363 U.S. 528, 534, 80 S. Ct. 1326 (1960) (authorizing injunctions by union against carrier for minor dispute); *Westchester Lodge 2186 v. Railway Express Agency*, 329 F.2d 748, 752-53 (2d Cir. 1964) (same). The majority's contention that a damages remedy would give the railways a lever over the unions ignores the fact that a

holding that damages are never appropriate as a remedy for an illegal strike permits the union to strike with impunity over a patently minor dispute merely by unilaterally characterizing the dispute as major and the railway's actions as status quo violations. Thus, it seems to me that rather than deterring legitimate strike activity by labor organizations, a holding that monetary damages may be appropriate to remedy illegal activity by either the railways or the unions would serve to strengthen the balance of power envisioned by both entities when they initially agreed to the provisions of the RLA.

Under the majority's view that a railway cannot obtain damages even for strikes over disputes that are clearly minor ones, a railway's only recourse is injunction to halt the illegal strike. I am not prepared to say that an injunction, although an important remedy, will always be adequate to prevent and to compensate for illegal strikes by unions. Furthermore, even if the union, out of fear of being subject to damages, should opt not to strike over a dispute as to whose character (*i.e.*, major or minor) it was legitimately uncertain, the union is still left with several options. It can go to the federal courts, just as a carrier can, to enjoin the railway from violating the status quo provisions. *Detroit & T.S.L.R.*, 396 U.S. at 153-54, 90 S. Ct. at 301 (enjoining carrier from changing work conditions during mediation); *Local 553, Transport Workers Union of America v. Eastern Air Lines Inc.*, 695 F.2d 668, 674 (2d Cir. 1982) (citing cases). Or the union can turn to the alternative forum of the Adjustment Board where it can obtain resolution of the dispute. As the Supreme Court stated in authorizing injunctions for illegal strikes,

> the machinery of the Railway Labor Act channeled these economic forces, in matters dealing with railway labor, into special processes intended to compromise them. Such controversies, therefore, are not the same as those in which the [remedy] strips labor of its primary weapon without substituting any reasonable alternative.

Chicago River, 353 U.S. at 41, 77 S. Ct. at 640-41. The RLA's arbitration processes provide a reasonable alternative forum so that a union that fears the repercussions of a potentially illegal strike will not be left empty-handed.

The majority states that in the 66-year history of the RLA, no union or railway has ever been awarded damages from one another. Although I agree that no court has awarded a carrier damages against a union, a union at least on one occasion has been the beneficiary of a damages remedy arising from a violation of other provisions of the RLA. *See Bangor & A. R. v. Brotherhood of Locomotive Firemen & Enginemen*, 442 F.2d 812, 817 (D.C. Cir. 1971). In *Bangor & A.R.*, the union claimed damages against the railway for failing to replace firemen in the states of Oregon and Washington, which required that railways operating in those states maintain full firemen crews. The D.C. Circuit held that the union was not entitled to recover damages on behalf of its members for the amount the railway saved through the illegal failure to hire firemen because such damages would be too speculative in light of the fact that it was unclear how many of the victims would have been union members. *Id.* at 820. The court, however, held that the union was entitled to

recover dues, assessments, initiation fees and other payments that would have been made to the union if the additional firemen had been employed. It noted:

> There may well be an element of uncertainty in the precise amount of damage sustained by the Union. But established principle dictates that the burden of that uncertainty must fairly rest on the wrongdoer. . . . In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show [sic] the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.

Id. at 822.

Although I recognize that *Bangor* is unique in awarding damages to a union from a carrier, there is no reason to find that a damages remedy should not be reciprocal, especially in light of the RLA's primary goal of avoiding interruptions in service. As the Supreme Court stated in *Chicago River*, 353 U.S. at 34, 77 S. Ct. at 637, in response to the union's argument that the conciliation procedures for minor disputes were not compulsory. "It is to be doubted that the Brotherhood would support allowing carriers the same right to defeat the jurisdiction of the Adjustment Board that it claims for itself. The statutory language, however, would support no distinction." *Id.* Here, BMWE does not suggest that the railroads may bypass the RLA's conciliation processes and still escape

damages. Clearly, the RLA can only be effective if the obligations of the parties are reciprocal.

IV.

Because the RLA is a relatively unformed statute, few decisions have spoken about damages under the RLA and only a handful about damages for an unlawful strike. I recognize that the Supreme Court has not directly spoken on this issue.[21] I am not troubled by the virtual absence of cases holding that damages are permissible under the

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[21] In *Brotherhood of R.R. Trainmen v. Toledo, P. & W. R.R.*, 321 U.S. 50, 56, 64 S. Ct. 413, 417 (1944), the Supreme Court did state in dicta that the railroad should not have been awarded an injunction against a strike when the railroad had not first used every reasonable effort to conciliate the major dispute using the RLA's provisions. Noting that "the federal courts were deprived of the power to afford injunctive relief and respondent was remitted to other forms of legal remedy which remained available," *id.* at 56, 64 S. Ct. at 417, the Court cited to another part of its opinion, where it stated:

> Other means of protection remain. Suits for recovery of damages still may be brought in the federal courts, when federal jurisdiction is shown to exist. Federal statutes supply criminal sanctions, enforceable in the federal courts, against persons who interfere in specified ways with the operation of interstate trains or destroy the property of interstate railroads . . . With these and other remedies that may be available we are concerned no further than to point out that respondent's failure to observe the requirements of Section 8 has not left it without legal protection.

Id. at 63, 64 S. Ct. at 420 (citations omitted). This language suggests that the Supreme Court believed that a damages remedy was available to the railroad, at least for an illegal strike over a major dispute.

RLA for an illegal strike.[22] Railways often drop their damages claims against unions after receiving injunctive relief, so courts seldom address these claims. And, most minor disputes are resolved through the grievance and arbitration procedures mandated by the RLA without illegal strikes, and therefore these disputes do not come into court. Finally, the RLA is a relatively unformed statute, and the courts are just now confronting issues regarding it. *See, e.g., Burlington Northern Ry. v. Brotherhood of Maintenance Way Employes*, 481 U.S. 429, 107 S. Ct. 1841 (1987) (no jurisdiction to enjoin secondary picketing under RLA.)[23] I also recognize that the majority's holding

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[22] Only *Denver & R.G.W. R.R. v. Brotherhood of R.R. Trainmen*, 58 L.R.R.M. (BNA) 2568 (D. Colo 1965), *rev'd on other gds.*, 367 F.2d 137 (10th Cir. 1966), *rev'd*, 387 U.S. 556, 87 S. Ct. 1746 (1967), has permitted damages for an unlawful strike, although the decision contained no discussion of its reasoning.

[23] The majority cites this 1987 *Burlington Northern* case for the proposition that Congress, not the courts, should be the ones to sanction a damages remedy at this stage in the RLA's development. This argument is undercut by several factors. First, Congress specifically intended the courts to fashion remedies under the RLA, as is clear from the RLA's legislative history. And, Congress has amended the RLA without indicating that it now intends to take over the job of fashioning remedies. Second, as a panel of this Court held in *Kaschak*, appropriate remedies to enforce the RLA are to be determined by the courts on a case-by-case basis. 707 F. 2d at 906. Clearly, Congress would not be in the best position to determine what remedies are appropriate in each factual situation that may arise. Finally, the *Burlington Northern* Court refused to find an "implied *limit*" on secondary picketing at this stage of the RLA's development. The case, then, argues against the majority's position because the majority's refusal to recognize a damages remedy similarly places a limit on the RLA late in its development that only one other circuit

is in agreement with the holdings of the Fifth Circuit and of at least one other district court that have not permitted damages to remedy an illegal strike. In *Burlington Northern Railway v. Brotherhood of Maintenance of Way Employees*, 961 F.2d 86, 88-89 (5th Cir. 1992), the Fifth Circuit reaffirmed its holding in *Louisville & Nashville Railroad Co. v. Brown*, 252 F.2d 149 (5th Cir.), *cert. denied*, 356 U.S. 949, 78 S. Ct. 913 (1958), denying the railroad damages for an illegal strike. The *Burlington Northern* Court first held that the case was not distinguishable from *Brown* and that *Brown* prohibits damages whether labelled as damages or awarded as part of equitable relief. *Id.* at 88. It next held that *Brown* was still viable and could not be overruled absent *en banc* consideration or a contrary Supreme Court ruling.[24] *Id.* at 89.

In *Brown*, decided one year after *Chicago River*, the Fifth Circuit held that damages were not available to compensate a carrier for an illegal strike. The *Brown* court held:

> The Supreme Court has held that a major purpose of this Act was to provide a machinery for

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has ever imposed on the RLA in its 66-year history. *Burlington Northern* would counsel that such a limit should only be imposed by Congress, not by this Court.

[24] The *Burlington Northern* court cites to an article by Harry Lustgarten, *Principles of Railway and Airline Labor Law* (1984), which held that it was "unlikely" that courts in the future would award damages because of the potential impact it could have on unions. Interestingly, an article cited by the *Burlington Northern* court for other propositions in fact strongly advocated in favor of a damages remedy for unlawful strikes over minor disputes. *See* D. Arouca, *Damages for Unlawful Strikes Under the Railway Labor Act*, 32 Hastings L.J. 779 (1981).

> settling railway labor disputes in a manner that would prevent or minimize strikes . . . However, it does not follow that Congress has, by this announcement, even though stated in terms of "duty," intended to or succeeded in setting up a statutory right of action for damages for a breach of this duty. Where Congress sought to set up a right of action for damages for breach of duty in other management labor situations, it enacted a statute expressly spelling out the nature of the right of action. See 29 U.S.C.A. § 187, and so also in creating a right of action in the civil rights field. 42 U.S.C.A. §§ 1983, 1985, 1986. We do not think that Congress here intended to or did create a new statutory right of action for damages of the nature declared upon by the plaintiff in Count One.

Id. at 155.

While I agree that *Brown* is not distinguishable from *Burlington Northern* and recognize that *Brown* is the controlling authority in the Fifth Circuit, I disagree with the holdings of our sister circuit in those cases. *Brown* relies on the mistaken belief that Congress must spell out all available remedies when it cares to provide them, and that because the RLA fails to spell out a damages remedy, none exists. *Brown* confuses the distinction between a right of action and a remedy, and mistakenly holds that congressional silence is enough to foreclose a remedy. As discussed earlier, the *Franklin* Court made clear that "what remedies are available under a statute that provides a private right of action is 'analytically distinct' from the issue of whether such a right exists in the first

place." *Franklin*, 112 S. Ct. at 1032.[25] Once an implied right of action exists, as it does under the RLA, this Court must presume the availability of all appropriate remedies in the absence of congressional direction to the contrary. *Id.* at 1035. Because a right of action already has been implied under the RLA, neither Congress's silence as to RLA remedies nor its explicit creation of rights of action under other statutes is relevant.[26] What is relevant is whether Congress explicitly rejected a damages remedy under the RLA, which it has not, and whether a damages remedy is appropriate, which I believe it is.

Neither am I convinced by the district court cases cited by appellees. *National Airlines, Inc. v. Airline Pilots*

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[25] The *Burlington Northern* court discounts the *Franklin* decision with a sentence: "*Franklin* holds that damages are available in a suit under Title IX. Again, even if this Court were considering the issue on a clean slate, *Franklin* would not control." 961 F.2d at 88-89 n.9. The *Burlington Northern* court fails to recognize that the framework set out in *Franklin*, outlining when remedies are available under a recognized right, was set out in broad terms applicable to all statutes.

[26] The *Brown* Court noted that Congress, when it wanted to create a right of action for damages under other labor management statutes and under civil rights statutes, "expressly spell[ed] out the nature of the right of action." It cited to 42 U.S.C. §§ 1983, 1985 and 1986, as well as to the Labor Management Relations Act (LMRA), 29 U.S.C. §§ 185, 187. *Brown's* reasoning is undercut by *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239, 90 S. Ct. 400, 405 (1969), which later permitted an injunction and damages for violation of 42 U.S.C. § 1982 because "all necessary and appropriate remedies" are available once a right is implied. In addition, under Section 301 of the LMRA, courts have implied the availability of all remedies, including damages, to enforce Section 301. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57, 77 S. Ct. 912, 918 (1957).

Ass'n Intern., 431 F. Supp. 53, 54 (S.D. Fla. 1976), held that damages were not available to an air carrier for a union's violation of Section 2, First's duty to exert every reasonable effort to avoid interruption of service. *National Airlines* based its decision on *Brown*, as well as the policy consideration that employers could use a damages remedy as a "weapon with which to keep the unions and their agents in line." *Id.* at 54. However, although the case does not outline the facts involved, it appears that *National Airlines* involved a major dispute and subsequent "losses the [employer] incurs in the course of the collective bargaining process." *Id.* Those facts clearly distinguish *National Airlines* from this case involving an illegal strike over a minor dispute. In any event, I do not believe that a damages remedy for an illegal strike will permit an employer to take "unfair advantage" of a union. And, *Maas v. Frontier Airlines, Inc.*, 676 F. Supp. 224, 227 (D.Colo. 1987), which relied on *Brown* and denied damages under the RLA in a case involving a Section 2, Fourth claim based on a wrongful discharge, also is not controlling. *Id.*

The majority argues that this smattering of cases constitutes the "common law" of the RLA governing the issue of whether monetary damages can be an appropriate remedy under the RLA. I would argue that it is neither wise nor appropriate to rely almost exclusively on this single aspect of the RLA's history to determine the appropriateness of a remedy. Part of the historical background of the RLA is its legislative history, and the majority notes in Section II of the opinion that the legislative history expressly indicates that Congress expected

that the courts would use all remedies, including damages, to enforce the RLA's provisions. In any case, I do not believe that there has been any "common law" developed that addresses the issue of damages over an illegal strike. At best, there are three cases – two Fifth Circuit cases and one district court case relying on this Fifth Circuit precedent – which address the specific issue of damages over a minor dispute, and only a handful of cases which address damages against or in favor of a union or a railway in other contexts under the RLA. I do not believe these cases are adequate to constitute a sufficient body of "common law" to have established a careful balance of power between labor and management. Instead, these few cases are merely evidence that the Fifth Circuit has taken a position on the issue of damages for an illegal strike, that the issue has not been addressed by other circuits, and that the issue of damages in other context under the RLA has seldom been addressed by any court.

Neither would I find, as the majority does, that these cases are sufficient to shift the burden to the party seeking damages to demonstrate why monetary damages are appropriate in a particular case. If *Franklin* requires that we presume the availability of all appropriate remedies and *Kaschak* requires that the appropriateness of a given remedy be determined on a case-by-case basis, it would seem to me that the legislative history of the RLA requires that the presumption be that monetary damages are appropriate unless under the particular circumstances of the case they are shown not to be. I read the majority's opinion as holding that (1) while monetary damages are available under the RLA, (2) monetary damages can

never be appropriate to remedy the damage resulting to a railroad from an illegal strike over a minor dispute, and (3) that for such damages to be held to be appropriate, the railroad must demonstrate their appropriateness, which (4) the railroad in this case has failed to do. I believe that this holding is intrinsically inconsistent. Either damages can never be appropriate to remedy an illegal strike over a minor dispute, in which case, damages are not available as a matter of law in those situations and nothing which the railroad could present would make any difference, or, while damages are available as a matter of law, the appropriateness or non-appropriateness of such damages must be specifically demonstrated under the facts of the particular case. The majority opinion, however, appears to hold that monetary damages are never available in these situations, and that the railroad had the burden to demonstrate that damages are appropriate and failed to sustain that burden. Even if the majority's opinion is read as meaning that the railroad's burden here was to demonstrate broad changes in the industry or in the relationship between the unions and the railways that would justify the awarding of monetary damages, those changes would be matters of fact. Inasmuch as this case was decided on a motion by the union to dismiss, the railroad has had no opportunity to develop the factual basis which might support its contention that under the facts of this case, monetary damages are indeed appropriate.

V.

For the reasons outlined above, I would hold that there may be circumstances in which monetary damages are available to a railroad which suffers damages from a

union's strike over a minor dispute, in violation of Section 153, First and Section 152, First of the RLA.[27] I would not go so far as saying that damages are always appropriate to remedy an illegal strike. I only contend that, in this case, I am not prepared to say that the railroad could not present any set of facts which would demonstrate that an award of damages is appropriate. The blanket statement that the majority makes – that damages are not available to a railway for a union's illegal strike – ignores the mandate that a panel of this Court set out in *Kaschak:* that the appropriateness of a remedy under the RLA must be determined on a case-by-case basis. Because this case is only at the motion to dismiss stage, I believe it is wrong to hold that the railway has failed to demonstrate why damages are appropriate in this fact situation. Therefore, I would reverse the district court's granting of the motion

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[27] I would not, however, adopt CSX's argument that these damages could be characterized as equitable relief and therefore would not be substantially different from injunctive relief, which is permitted under the RLA. CSX argues that damages would be a penalty or restitutionary measure for the illegal strike. The Supreme Court has held that not all awards of money damages are necessarily legal relief. *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry,* 494 U.S. 558, ___, 110 S. Ct. 1339, 1348 (1990). Money damages are considered equitable relief when they are restitutionary, such as actions for disgorgement of improper profits, or when they are intertwined with equitable relief. *Id.* at ___, 110 S. Ct. at 1348. Here, CSX is seeking compensation in monetary damages for the injury it suffered from the illegal strike. It is not seeking damages for a violation of the injunction or seeking a repayment of unjust enrichment. Therefore, characterizing the damages as equitable relief is not appropriate.

to dismiss and remand the case to the district court for further proceedings.

RALPH B. GUY, JR., Circuit Judge, with whom Judge Jones concurs, concurring in part and delivering the opinion of the court in part.

Judge Batchelder concludes that the Railway Labor Act allows a railroad to recover damages from a union that calls a strike over what is later adjudged to be a minor dispute. Since no court in the 66-year history of the RLA has published an opinion allowing such damages, we are forced to confront two questions of first impression. First, given the RLA's silence on remedies, are damages ever available for violations of the Act? Second, if so, are damages *appropriate* for this type of violation? Judge Batchelder answers both questions in the affirmative. We agree that damages are available under the RLA in some circumstances, but we hold damages are not appropriate here.

In *Franklin v. Gwinnett County Public Schools*, ___ U.S. ___, 112 S. Ct. 1028 (1992), the Supreme Court clarified the analysis that must be used to determine whether a particular remedy is available under a federal statute. Once an implied right of action has been found, a court must "presume the availability of all *appropriate* remedies unless Congress has expressly indicated otherwise." *Id.*, 112 S. Ct. at 1032 (emphasis added).

The RLA contains no provisions for private enforcement. However, the legislative history, much of which Judge Batchelder quotes, leaves no doubt that Congress intended for the courts to develop remedies. Within four years of the RLA's enactment, the Supreme Court had

held that private parties could enforce its provisions. *Texas & N.O. R.R. Co. v. Brotherhood of Ry. and S.S. Clerks*, 281 U.S. 548, 569-70 (1930).

Since the RLA contains an implied right of action, *Franklin* directs us to presume that this right can be enforced by damages in appropriate cases unless Congress has clearly spoken to the contrary. As Judge Batchelder has demonstrated, the legislative history reveals that Congress did not rule out the possibility of damages for violations of the RLA. Therefore, it follows from *Franklin* that damages are available under the RLA in appropriate cases.

The more difficult question is whether this is an *appropriate* case for damages under the RLA. We conclude that it is not.

The legislative history of the RLA demonstrates that Congress intended for the courts to develop private remedies on a case-by-case basis.[1] That is, Congress

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[1] *See* 1 *The Railway Labor Act of 1926 – A Legislative History* at 282-84 (1988) (remarks of Representative Newton, floor manager of the bill: "The law for enforcement would be developed in the courts"); *see also* Hearings on H.R. 7180 Before the House Commerce Committee, 69th Cong., 1st Sess. 40 (1926) (remarks of labor spokesman D. Richberg: "[T]he law for such enforcement or compulsion should be developed in the courts"). The bill itself was an agreement hammered out between labor and the railroads and ratified by Congress. Therefore, courts have treated the statements of labor and railroad representatives as part of the legislative history. *See, e.g., Chicago & N.W. R.R. Co. v. United Transp. Union*, 402 U.S. 570, 577 (1971) (quoting Richberg testimony).

expected the courts to develop a body of law, analogous to the common law, for the enforcement of the RLA.

The federal courts responded to that challenge by developing appropriate private remedies to redress various types of violations of the RLA. *See, e.g., Texas & N.O. R.R. Co.*, 281 U.S. at 571 (upholding injunction against railroad to protect employees' right to organize); *Steele v. Louisville & N. R.R. Co.*, 323 U.S. 192, 207 (1944) (allowing injunctive relief and damages to redress union's breach of duty of fair representation).

Historically, however, the courts have been reluctant to find that damages are an appropriate remedy for an RLA violation.[2] With the exception of awards of damages against unions for breaches of their duty to represent employees fairly, *see Steele*, 323 U.S. at 207, the federal courts have enforced the RLA almost exclusively through injunctive relief. We are aware of only four published decisions that have approved the use of damages to remedy RLA violations other than breaches of the duty of fair representation. *See Burke v. Compania Mexicana De Aviacion, S.A.*, 433 F.2d 1031, 1034 (9th Cir. 1970) (approving damages for employee discharged for union activities); *Belton v. Air Atlanta, Inc.*, 647 F. Supp. 28, 31-32 (N.D. Ga. 1986) (same); *Brown v. World Airways, Inc.*, 539 F. Supp. 179, 181 (S.D.N.Y. 1982) (same); *Brady v. Trans World Airlines, Inc.*, 223 F. Supp. 361, 370 (D. Del. 1963) (approving damages for employee wrongfully discharged at union's

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[2] As Judge Batchelder points out, however, the adjustment boards set up under the RLA have awarded damages in some cases.

behest), *aff'd*, 401 F.2d 87 (3d Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969).[3]

In the 66-year history of the RLA, no federal court has published an opinion holding that a union may recover damages from a railroad or that a railroad may recover damages from a union. On rare occasions, *individual employees* have been allowed to recover damages from their unions or their carriers, but the courts have not permitted the railroads and unions to use the club of damages against each other.

Congress intended for the courts to set up a "common law" for the appropriate enforcement of the RLA. We conclude that the common law that has emerged does not contemplate awards of damages between unions and railroads.

Damages awards between railroads and unions are inappropriate because they threaten the delicate balance intended by the RLA. A court's task in enforcing the RLA "is to implement a remedial scheme that will best effectuate the purposes of the Railway Labor Act, recognizing

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[3] In support of the proposition that damages are generally appropriate under the RLA, Judge Batchelder cites *United Industrial Workers v. Board of Trustees of Galveston Wharves*, 400 F.2d 320 (5th Cir. 1968), *cert. denied*, 395 U.S. 905 (1969), and *United Transportation Union v. Florida East Coast Railway Co.*, 586 F.2d 520 (5th Cir. 1978). However, in *Galveston Wharves*, the Fifth Circuit approved the award of *backpay*. 400 F.2d at 327. Backpay is considered to be an equitable remedy because it represents a benefit wrongfully withheld. *See Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990). In *Florida East Coast Railway*, the court limited its holding to determining the applicable statute of limitations and did not reach the propriety of the award of damages.

that the overarching legislative goal is to facilitate collective bargaining and to achieve industrial peace." *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 47 (1979).

In *Foust*, the Court reversed an award of punitive damages against a union that had breached its duty of fair representation. The Court agreed that punitive damages would induce unions to represent members fairly, but decided that such awards could impair unions' financial stability and thereby upset the careful balance of interests necessary to achieve the purposes of the RLA. *Id.*, 442 U.S. at 48, 50-51. *See also Brotherhood of Ry. Carmen v. Delpro Co.*, 579 F. Supp. 1332, 1335-36 (D. Del. 1984) (holding that award of punitive damages against *carrier* would undermine purposes of RLA).

With this general background in mind, we now turn to the specific question of whether damages are appropriate to remedy a union's violation of its duty to refrain from striking over a minor dispute. In 1957, the Supreme Court held that injunctive relief is appropriate to enforce the union's duty to submit such minor disputes to a conference. *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R. Co.*, 353 U.S. 30, 39-42 (1957). Since 1957, the courts have approved such injunctive relief on many occasions. *See, e.g., Chicago & N.W. Transp. Co. v. Railway Labor Executives' Ass'n*, 855 F.2d 1277, 1287 (7th Cir.), *cert. denied*, 488 U.S. 966 (1988); *Louisville & N. R.R. Co. v. Brotherhood of Locomotive Eng'rs*, 297 F.2d 608, 609 (6th Cir. 1961), *aff'd*, 373 U.S. 33 (1963).

One year after *Chicago River* approved the use of an injunction to stop a strike over a minor dispute, the Fifth Circuit decided that a damages remedy was not available

to a railroad that had been injured by such a strike. *Louisville & N. R.R. Co. v. Brown*, 252 F.2d 149, 155 (5th Cir.), *cert. denied*, 356 U.S. 949 (1958).

Eighteen years after *Brown* was decided, a district court within the Fifth Circuit reaffirmed its holding. *National Airlines, Inc. v. Airline Pilots Ass'n Int'l*, 431 F. Supp. 53 (S.D. Fla. 1976). Like the Supreme Court's opinion in *Foust*, the *National Airlines* decision explained that a damages remedy could impair the labor-management relationship intended by the RLA:

> The life cycle of labor-management bargaining is heated and oftentimes results in bitter accusations. Representatives attempt to secure the best possible terms for their respective sides. To create a right of action in favor of an employer against a union and its collective bargaining representatives for losses the former incurs in the course of the collective bargaining process would, in effect, give the employer a weapon with which to keep the unions and their agents "in line." Surely, neither Congress nor the Appellate Courts would fashion a remedy which would give the employer a lever upon which to gain such an unfair advantage.

National Airlines, 431 F. Supp. at 54. Accordingly, the court, which had issued an injunction against the union, dismissed the carrier's claim for damages. *Id.* at 54-55.

Most recently, the Fifth Circuit reconsidered *Brown* in *Burlington Northern Railway Co. v. Brotherhood of Maintenance of Way Employees*, 961 F.2d 86 (5th Cir. 1992). The court, noting that neither the Supreme Court nor any other circuit had visited the issue since 1958, concluded

that *Brown* remains good law. *Burlington Northern*, 961 F.2d at 89.

No published opinion has ever held that a carrier may recover damages against a union for an illegal strike over a minor dispute.[4] Of course, the decisions of the Fifth Circuit do not bind us. However, since at least 1958, the RLA "common law" has been that a railroad may not recover damages for a strike over a minor dispute.

Congress envisioned that the courts would set up a body of law to enforce the RLA. The resulting body of law has not permitted railroads and unions to recover damages against each other generally and, particularly, in the situation presented in this case. After 66 years, a court should be reluctant to change the balance that has been struck between railroads and unions. At a minimum, a party requesting such a change should be required to demonstrate why the remedies that have been appropriate for 66 years are no longer good enough.

CSX has made no such demonstration. We have no reason to believe that the need for damages to deter illegal strikes over minor disputes is any greater today than it was when *Brown* was decided in 1958 or when the RLA was enacted in 1926.

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[4] However, in an *unreported* case, a district court, without discussion, awarded damages to a railroad for an illegal strike. *Denver & Rio Grande W. R.R. v. Brotherhood of R.R. Trainmen*, 58 L.R.R.M. (BNA) 2568 (D. Colo. 1965), *rev'd on other grounds*, 367 F.2d 137 (10th Cir. 1966), *rev'd*, 387 U.S. 556 (1967). On remand, the damages award was not reinstated.

By contrast, the concerns that weigh against such a remedy are as present today as they ever were. In the volatile atmosphere of labor-management relations, the threat of a damages action could upset the balance intended by the RLA.

The problem is particularly acute in a case such as this where the union cannot know with certainty at the time it calls a strike whether a court will later decide that the dispute was minor or major. If damages were available and the union guessed wrong, it would be liable for damages that could deplete the union treasury and impair its effectiveness as the collective bargaining agent. *Cf. Foust*, 442 U.S. at 50-51. This threat of crushing financial loss allows the carrier to keep the union "in line" and the employees off the picket line even in cases where the dispute is later adjudged to be major. *See National Airlines*, 431 F. Supp. at 54.

Even if CSX could point to modern developments justifying an award of damages under the RLA, such an argument properly should be made to Congress. Five years ago, the Supreme Court considered for the first time a claim that the RLA implicitly bars secondary picketing. *Burlington N. R.R. Co. v. Brotherhood of Maintenance of Way Employes*, 481 U.S. 429 (1987). The Court rejected this novel claim:

> We decline, *at this advanced stage of the RLA's development*, to find in it an implied limit on a union's resort to secondary activity. Instead, "if Congress should now find that abuses in the nature of secondary activities have arisen in the railroad industry . . . *it is for Congress, and not the*

> *Courts, to strike the balance 'between the uncontrolled power of management and labor to further their respective interests.'."*

Id. at 452-53 (citation omitted) (emphasis added). If changes in the industry merit the result CSX seeks, Congress, not the courts, should create the appropriate remedy.

An award of damages would change the careful balance between labor and management that has evolved in the 66 years since the RLA was enacted. Since CSX has not shown that any change in the industry or the law warrants such a result, we **AFFIRM** the decision of the district court to dismiss CSX's claim for damages.

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No. 92-606

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,
v.
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, an unincorporated association, BEN OCHOA, GENERAL CHAIRMAN, E.R. SPEARS, GENERAL CHAIRMAN, PAUL S. SWANSON, GENERAL CHAIRMAN, and BRUCE G. GLOVER, GENERAL CHAIRMAN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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COUNTER-STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

When a union strikes over a dispute which is later determined by a court to be "minor" in violation of § 2 First of the Ralway Labor Act ("RLA"), 45 USC § 152 First, is the appropriate remedy for judicial enforcement of § 2 First limited to equitable injunctive relief restoring the status quo and channeling the parties to resolution of the dispute under the RLA procedures.

TABLE OF CONTENTS

	Page
COUNTER-STATEMENT OF THE QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	vi
JURISDICTION	1
STATUTES INVOLVED	1
STATEMENT OF THE CASE	1
A. Course of Proceedings and Disposition Below	2
B. Statement of Facts	4
1. Petitioner's Misstatement of the Facts Established in the record	4
2. Counter-statement of the Facts	6
REASONS FOR DENYING THE WRIT	10
THE QUESTION PRESENTED DOES NOT MEET THE CRITERIA SPECIFIED IN SUPREME COURT RULE 10 MERITING THE GRANT OF CERTIORARI	10
I. THERE EXISTS NO CONFLICT AMONG THE CIRCUIT COURTS	10
II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY APPLICABLE DECISIONS OF THE SUPREME COURT	15
III. THE DECISION BELOW PRESENTS AN ISSUE THAT HAS BEEN LONG SETTLED AND IS, THUS, NOT AN IMPORTANT QUESTION OF FEDERAL LAW REQUIRING SUPREME COURT RESOLUTION	19
A. The Courts Have Consistently Held That Creation of a Strike Damage Remedy Under the RLA Is a Matter for Congress and Not the Courts	20

TABLE OF CONTENTS—Continued

Page

B. The Courts Have Consistenly Held That Creation of a Strike Damage Remedy Under the RLA Is Inappropriate Because It Would Be Destructive of the Proper Functioning of the RLA 23

1. The Courts recognize that after sixty-six years the implication of a damage remedy which could undermine RLA policy objectives requires a showing that injunctive remedies are no longer sufficient 24

2. Petitioner has made no showing that injunctive relief is no longer sufficient and its argument is premised on the false legal conclusion that there is "an illogical asymmetry" in the remedies available under the RLA and the false factual assumption that there is a need for deterrent measures 26

3. The Courts and commentators recognize that a damage remedy would be inappropriate, because it would be destructive of the RLA dispute resolution procedures and undermine its policy objectives 28

CONCLUSION 30

APPENDIX 1a

TABLE OF AUTHORITIES

CASES Page

AFA v. Horizon Air, 976 F.2d 541 (9th Cir. 1992) 11, 14, 17, 20, 28
Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad, 553 U.S. 30 (1957) 2, 5, 11, 27
Burlington Northern v. BMWE, 481 U.S. 429 (1987) 19, 20, 23
Burlington Northern Railroad Company v. Brotherhood of Maintenance of Way Employes, 961 F.2d 86 (5th Cir.), *reh'g en banc denied*, 968 F.2d 18 (5th Cir. 1992) ..... *passim*
Butte, Anaconda & Pacific Railroad Company v. Brotherhood of Locomotive Firemen and Enginemen, 268 F.2d 54 (9th Cir.), *cert. denied*, 361 U.S. 864 (1959) 2
Carbon Fuel Co. v. Mine Workers, 444 U.S. 212 (1979) 21
Chicago & Northwestern Railway Co. v. United Transportation Union, 402 U.S. 570 (1971) 14, 16, 17, 20
Consolidated Rail Corp. v. R.L.E.A., 491 U.S. 299 (1989) 4
CSX Transportation, Inc. v. N.J. Marquar, et al., No. 91-5689, slip op., —— F.2d —— (6th Cir. November 13, 1992) ..... *passim*
Denver and Rio Grande Western Railroad v. Brotherhood of Railroad Trainmen, 58 LRRM 2568 (D.C. Co. 1965) (not officially reported), *rev'd on other grounds*, 367 F.2d 157 (10th Cir. 1966), *rev'd*, 387 U.S. 556 (1967) 15
International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42 (1979) 13, 18, 24, 29
Franklin v. Gwinnette County Public Schools, —— U.S. ——, 117 L.Ed.2d 208 (1992) 17, 18, 19, 21, 22
Louisville & Nashville Railroad Company v. Brown, 252 F.2d 149 (5th Cir.), *cert. denied*, 356 U.S. 949 (1958) 10, 11, 12, 13, 21

TABLE OF AUTHORITIES—Continued

Page

National Airlines, Inc. v. Airline Pilots Association, 431 F. Supp. 53, 93 LRRM 2509 (S.D. Fl. 1976) ..... *passim*
Shoreline Railroad v. Transportation Union, 396 U.S. 142 (1969) 2, 29
Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192 (1944) 17
Teamsters v. Terry, 494 U.S. 558 (1990) 17
Texas & New Orleans Railroad Co. v. Brotherhood of Railway and Steamship Clerks, 281 U.S. 548 (1930) 16
United Industrial Workers of the Seafarers International Union v. Board of Trustees of Galveston Wharves, 400 F.2d 320 (5th Cir. 1968), *cert. denied*, 395 U.S. 905 (1969) 27
Virginian Railway Co. v. System Federation No. 40, 300 U.S. 515 (1937) 16

BOOKS AND ARTICLES

Lustgarten, *Principles of Railroad and Airline Labor Law*, RALL Publications 29, 30

STATUTES

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681-1688 18
§ 303 of the Labor Management Relations Act, 29 U.S.C. § 187 ..... 21, 22
§ 301 of the Labor Management Relations Act, 29 U.S.C. § 185 21
National Labor Relations Act, 29 U.S.C. § 158 (b) (4) 19, 21, 23
Norris Laguardia Act, 29 U.S.C. § 101 *et. seq.* 16, 17, 25
§ 2 First of the Railway Labor Act, 45 U.S.C. § 152 First ..... *passim*
§ 2 Sixth of the Railway Labor Act, 45 U.S.C. § 152 Sixth ..... *passim*
§ 2 Seventh of the Railway Labor Act, 45 U.S.C. § 152 Seventh ..... *passim*
28 U.S.C. § 1254(1) 1
29 U.S.C. § 182 22

TABLE OF AUTHORITIES—Continued

RULES Page

Federal Rules of Civil Procedure Rule 12(b) (6) 3, 4
Supreme Court Rule 10.1 ..... 10, 15, 19
Supreme Court Rule 15.1 2

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Brotherhood of Maintenance of Way Employes, Ben Ochoa, E. R. Spears, Paul S. Swanson, and Bruce G. Glover (hereinafter referred to collectively as "Respondents" or "BMWE") respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's opinion in *Burlington Northern Railroad Company v. Brotherhood of Maintenance of Way Employees*, 961 F.2d 86 (5th Cir.), *reh'g en banc denied*, 968 F.2d 18 (5th Cir. 1992). In support of denial of the writ Respondents would respectfully show as follows:

JURISDICTION

Jurisdiction has been invoked by writ of *certiorari* pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The question presented involves the provisions of Sections 2 First, Sixth, and Seventh of the Railway Labor Act ("RLA"), 45 U.S.C., Section 152 *et seq.*, which are set forth in the Appendix. Section 2 First is set forth below:

> First. Duty of carriers and employees to settle disputes
>
> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any other carrier growing out of any dispute between the carrier and the employees thereof.

STATEMENT OF THE CASE

Petitioner's statement of the case contains factual assertions which are beyond the record or are misstate-

ments of the facts established in the record. Therefore, heeding Supreme Court Rule 15.1., Respondents submit the following counter-statement of the case.

A. Course of Proceedings and Disposition Below

On June 26, 1990 Petitioner Burlington Northern ("BN") filed a "Verified Complaint for Injunctive Relief" [1] seeking to enjoin a planned 24 hour strike by the BMWE against a selected portion of BN's property. The strike was called over what BMWE reasonably believed to be a "major dispute" between the parties which would give it the right to resort to self-help.[2]

On that same date, the District Court entered a Temporary Restraining Order ("TRO") (R.121-23)[3] restraining the BMWE from engaging in any strike activity. Upon notice of the TRO, BMWE complied and refrained from any further strike or self-help action. It is undisputed that BMWE has fully complied with all of the orders of the District Court. The strike injunction was continued by agreement through hearing on BN's Motion for Preliminary Injunction. (R.124, 125-26).

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[1] As indicated by the heading, Petitioner's complaint, which was never amended, sought injunctive relief under the authority of *Br. R.R. Trainmen v. Chicago River and Indiana R.R.*, 553 U.S. 30 (1957) against a strike by BMWE, and nowhere contains any allegations with respect to the damages it now seeks to recover. The sole mention in the complaint of any monetary recovery is the passing reference in the prayer for a permanent strike injunction that BN also seeks certain unspecified "damages incurred."

[2] *See, e.g., Shoreline Railroad v. UTU*, 369 U.S. 142, 154-155 (1969); *Butte, Anaconda & Pacific Railroad Co. v. BLE*, 268 F.2d 54 (9th Cir.), *cert. denied*, 361 U.S. 864 (1959). As this Court stated in *Shoreline, supra*, 396 U.S. at 154-155 "it could hardly be expected that the union would sit idly by as the railroad rushed to accomplish the very result the union was seeking to prohibit. . . . If the railroad is free to resort to self-help [by making a unilateral change], the union cannot be expected to hold back its own economic weapons, including strike."

[3] Citation to the Record on Appeal will be by the notation "R." followed by the relevant pages of the Record.

At the close of the Preliminary Injunction hearing on August 20, 1990, the District Court found a substantial likelihood that the dispute was "minor" (and not "major" as contended by BMWE) and entered a preliminary injunction against any further strike activity pending trial on the merits. (R.295-98).

On January 9, 1991, BN moved for Summary Judgment seeking a permanent strike injunction and the recovery of monetary damages in the guise of a claim for equitable restitution. (R.393-400; R.401-27). By response filed February 6, 1991, BMWE opposed the entry of a permanent strike injunction asserting that the dispute was a "major" dispute arising from BN's violation of Section 2 SEVENTH of the Railway Labor Act ("RLA"), 45 U.S.C. § 152 SEVENTH, over which BMWE had a right to engage in self-help (R.469-88).

Simultaneously BMWE moved pursuant to Rule 12 (b)(6), Federal Rules of Civil Procedure ("F.R.C.P."), to dismiss BN's claim for monetary relief, which was then couched by BN only as a claim for equitable restitution, not the compensatory damages which it apparently now seeks. (R.435-37; R.438-68).

On February 14, 1991, the District Court granted BN's Motion for Summary Judgment with respect to a permanent strike injunction, but denied BN's request for monetary relief, finding that BN "has failed to show that it is entitled to monetary relief as a matter of law." (R.874-75). On that same date, the District Court entered a separate order finding the dispute to be "minor" and not "major," and permanently enjoined BMWE and certain of the individual defendants from engaging in any further strike activity, which order has been fully complied with. (R.872 ff.). On February 27, 1991, BMWE moved to amend the breadth of the Court's permanent strike injunction to limit its scope to the specific dispute at issue in this case. (R.876-85).

On March 7, 1991, the court entered an Order granting BMWE's Rule 12(b)(6) motion to dismiss BN's

claim for monetary relief (R.913-14), and entered a separate Final Judgment (R.916) on that same date, which held that BN "have no monetary recovery from defendants." (R.916).

On March 20, 1991, the District Court entered an order granting BMWE's Motion to alter the breadth of the strike injunction (R.939-40). In accordance therewith, on March 21, 1991 the District Court amended its February 14, 1991 permanent strike injunction limiting its scope to the dispute at issue in this case. (R.941).

Notice of Appeal from the District Court's March 7, 1991 Rule 12(b)(6) dismissal of BN's request for monetary relief was filed on April 4, 1991. BN's suggestion for hearing *en banc* before the Fifth Circuit was denied on October 29, 1991. Thereafter, on May 22, 1992 the Fifth Circuit affirmed the District Court decision. BN once more filed a suggestion for rehearing *en banc*, which again was denied by the Fifth Circuit on July 9, 1992. BN filed its petition for Writ of Certiorari on October 7, 1992.

B. Statement of Facts

1. *Petitioner's Misstatement of the Facts Established in the record*

The facts found by the District Court in granting the permanent strike injunction bore only on the question of whether the dispute was "minor" or "major", based on whether BN had asserted an arguable contract justification for its action in the face of BMWE's position that BN had made a unilateral contract change. *See Consolidated Rail Corp. v. R. L. E. A.*, 491 U.S. 299 (1989). The District Court made no findings regarding the facts or circumstances relating to the strike itself or the effects thereof. Indeed, the District Court excluded such evidence during the preliminary injunction hearing, which was the only evidentiary hearing conducted below. In addition, the lower court decisions from which this writ has been taken originate from the District Court's Rule 12(b)(6) dismissal of BN's claim for monetary relief

and, thus, the only record facts relevant to the question presented for review are those contained in Petitioner's unamended "Verified Complaint for Injunctive Relief". Thus, the bulk of the facts recited by Petitioner (*See* Petition at 7-8; 24 Fn. 6; 25 Fn. 7, 26) concerning what occurred during the strike and even whether BN actually suffered any of the damages which it now seeks to recover, are simply beyond the pleadings and the facts established in the record.

BN's factual statement is not only an embellishment upon its pleading, but also contains, in BMWE's view, misstatements of the facts and circumstances which actually led up to and occurred during and after the strike with regard to BMWE's motivation for engaging in self-help over this dispute. As discussed in the factual statement to follow, BMWE reasonably believed that the strike action it was taking was lawful. Moreover, in the broader sense, BN's factual implication that the lack of a damage remedy here will leave labor organizations undeterred from engaging in illegal self-help and the carriers with no remedy [4] is totally without foundation in this record (*See* Petition, at 10, 25-26).

So that BMWE is not deemed to have waived its objection to such misstatements of the factual record, BMWE submits this counter-statement of the case. The Court is advised, however, that the following recitation of facts, just as the recitation contained in the Petition, goes beyond the facts pled in Petitioner's complaint or which are the subject of specific findings of the Courts below. The only purpose for providing this counter-statement of facts is to protect BMWE from the Court's assumption that the factual statement presented by Petitioner is as established in the record.

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[4] Thirty-five years ago the Court in *Brotherhood of R. R. Trainmen v. Chicago River*, 353 U.S. 30 (1957) held that the appropriate remedy was a strike injunction.

2. *Counter-statement of the Facts*

BMWE is a labor organization which serves as the collective bargaining representative of employees of BN who work within the maintenance of way craft and class. (R.519).[5] Subordinate to the Grand Lodge of BMWE are System Federations, which are intermediate labor organizations generally organized along carrier lines. (R.520-21). The principal officer of each System Federation is its General Chairman.[6] Since the present day BN is the product of the merger of several formerly independent railroads, there are presently four System Federations of BMWE on BN, each of which is a party to and administers several collective bargaining agreements between those Federations and BN. (R.521-22)

One of the agreements to which each BMWE System Federation on BN is a party is the "Schedule Agreement" which generally governs the hours of service, rates of pay, and working conditions of the employees working within the BMWE craft and class. (R.522). In addition to the Schedule Agreements, however, BN and certain of the BMWE System Federations are also parties to various side or special agreements which supersede the terms of the Schedule Agreement in connection with the specific matters they were negotiated to cover. One such special agreement between BN and three of the four BMWE System Federations is the September 16, 1987 P-811 special agreement. (R.523) The P-811 Agreement specified the terms under which BMWE members would be employed with reference to BN's installation of concrete ties utilizing the P811-S machine. BMWE's position is that the P-811 special agreement superseded the Schedule Agreement and preserved certain jobs from

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[5] The maintenance of way craft and class consists of the employees who construct and maintain the track, buildings and bridges on the right of way along BN's rail lines. (R.520).

[6] Individual defendants Ben Ochoa, E.R. Spears, Paul Swanson and Bruce Glover were respectively the General Chairmen of the four System Federations of BMWE on BN at times relevant to this case. (R.521-22).

further subcontracting on BN's P-811 concrete tie installation program.[7] In BMWE's view, Paragraph "E" of the P811-S Agreement preserved these jobs by providing that BN personnel represented by BMWE would be "bulletined" for all work ahead of and behind the P-811 track-laying machine, including the installation of the "clips" and "insulators" holding the concrete tie to the rail. (Exhibits 3 at R.716; R.529, 533, ff.).[8]

For the first two and a half years after execution of the P-811 Agreement, BMWE members bid on and were assigned all the jobs involving the installation of clips and insulators as required by the P811-S Agreement. (R.534). In March of 1990, however, BMWE received a letter advising that BN intended to make what BMWE believed would be a unilateral change in the P-811 agreement by subcontracting the clipping function to third party contractors. (Exhibit 19 at R.795; R.535). In BMWE's view, this would not only deprive BMWE members of jobs, but would also result in a unilateral change in the P811-S Agreement because it would deny BMWE the very consideration it received for entry into the P-811 agreement, *i.e.*, the preservation of clipping jobs from future subcontracting. (R.538-40). The preservation of these jobs was the *quid pro quo* for BMWE's agreement that certain other work involving the P-811 machine could be subcontracted and for BMWE's agreement to grant BN certain work rule concessions in the P-811 Agreement.

In BMWE's view, if BN stopped issuing bulletins for these jobs to BMWE members and subcontracted the

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[7] The consideration received by BMWE for entry into the P-811 agreement was the promise that certain jobs, particularly those involving the clipping function, would be preserved to BMWE members and would not be subject to subcontracting in the future. (R.530-31, 532-34). In return for that promise, BMWE agreed that certain other work could be subcontracted by BN and granted BN other work rule concessions. (R.530, 532).

[8] A bulletin is the procedure whereby members of BMWE bid on jobs on BN. (R.524-25).

clipping function to a third party, this would be a unilateral change in employee rates of pay, rules and working conditions as embodied in the P-811 agreement without complying with the procedures prescribed by Section 6 of the RLA. (R.538-40). That being the case, this would create a "major" dispute because BN would have violated its obligation to maintain the status quo pursuant to Section 2 SEVENTH of the RLA. (*Id.*). BMWE, thus, felt it had the right to exercise self-help, including taking strike action, to protect its members' interests.[9]

At the request of the BMWE General Chairmen, and in an attempt to resolve the matter short of self-help, a meeting was held with BN officials on April 5, 1990 to discuss the matter. (R.536). At that meeting, and later by corresondence that same date, the General Chairmen specifically advised BN representatives that they viewed the subcontract, if implemented, as a unilateral change in the P-811 agreement, which would create a "major" dispute between the parties, allowing resort to self-help if not resolved. (*Id.*).

The affected General Chairman conferred with the President of BMWE and sought his verification that the dispute was major. (Exhibit 23 at R.809; R.538-39). After obtaining his concurrence (R.538, 540), the three affected BMWE General Chairmen again wrote to BN on May 2, 1990 advising that BMWE would view the subcontracting of the clipping function on BN's concrete tie installation program, as a major dispute over a unilateral contract change. (R.538, 540-41; Exhibit 24 at R.811). BMWE subsequently received a letter dated May 11, 1990 from BN disputing BMWE's position. (R.541). Since it appeared BN was intent upon proceeding to implement this change, BMWE believed the only recourse available to it to protect the interests of its members was to engage in self-help in the event the carrier brought the clip car on to the property. (R.541).

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[9] *See* cases cited at Footnote 2, *supra*.

On May 18, 1990, the Grand Lodge President verified in writing his earlier decision that this was a major dispute over a unilateral change in an existing agreement. (Exhibit 26 at R.816; R.542). He thus authorized the affected BMWE General chairmen to initiate the steps to obtain strike sanction under the Union's Constitution. (*Id.; see* Exhibit 1 at R.586; Exhibit 28 at R.825).

Before taking strike action, special membership meetings were held at each Local Lodge affected by the dispute as required by Article XX § 17(b) of the BMWE Constitution. (R.542-43). At these meetings the members were orally advised about the nature of the dispute and the basis upon which BMWE believed that this was a "major" dispute over which the membership had the right to strike if they voted to do so. (R.543; Exhibit 29 at R.829); Exhibits 30 at R.853; Exhibit 31 at R.855). At these meetings, the membership voted overwhelmingly to strike over this dispute. (R.843-44; Exhibit 33 at R.859).

Based on the membership's determination to strike over this dispute, on June 25, 1990, in accordance with Article XX § 17(b) of the BMWE Constitution, the Grand Lodge officers authorized the initiation of strike action against BN in response to the unilateral change. (R.544; Exhibit 32 at R.857; Exhibit 34 at R.861). The strike action authorized, however, was specifically limited to last for twenty-four hours, from 6:00 a.m. on June 26, 1990 to conclude at 6:00 a.m. on June 27, 1990, and to cover only the portion of BN's property within the one BMWE System Federation (the former CB&Q lines) upon which BN had implemented the clip car. (R.544; Exhibit 35 at R.864). Contrary to BN's assertion in its Petition, the strike was not system wide and was focused only on the one section of BN's property where the unilateral change had been implemented.

BMWE engaged in strike action based on its belief that it could lawfully exercise self-help in response to BN's violation of its status quo obligation under Section 2

SEVENTH of the RLA by making a unilateral change in the P-811 agreement. (R.545-46).

Immediately upon notice of entry of the TRO, BMWE ceased all self-help and other strike activity, and has fully complied with that and all subsequent injunctive orders issued by the District Court. (R.546; Exhibit 37 at R.871).

REASONS FOR DENYING THE WRIT

THE QUESTION PRESENTED DOES NOT MEET THE CRITERIA SPECIFIED IN SUPREME COURT RULE 10 MERITING THE GRANT OF CERTIORARI

As relevant to the question presented here, Supreme Court Rule 10 specifies that the writ should be granted only if (1) there is a conflict among the Circuit Courts; (2) the case below conflicts with a decision of this Court; or (3) this case presents an important unsettled question of federal law which this Court should resolve. Supreme Court Rule 10.1(a) and (c). Since none of the criteria apply here, there is no basis for granting the writ.

I. THERE EXISTS NO CONFLICT AMONG THE CIRCUIT COURTS

Far from there being a conflict among the Circuit Courts, the question presented seeks reversal of the Fifth Circuit's decision in *BN v. BMWE*,[10] which comports with sixty-six years of settled *jurisprudence* under the RLA. This decision followed over 30 years of precedent in the Fifth Circuit[11] and is in accord with the result in a

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[10] *BN v. BMWE, supra*, 961 F.2d 86.

[11] *Louisville & Nashville Railroad Company v. Brown*, 252 F.2d 149, 155 (5th Cir.), *cert. denied*, 356 U.S. 949 (1958); *National Airlines v. ALPA*, 431 F. Supp. 53 (S.D. Fla. 1976).

recent decision by the Sixth Circuit.[12] The decision is also in accord with the reasoning of the Ninth Circuit,[13] in a related context arising under § 2 First. In sum, there are no conflicting decisions and all the Circuit Courts are in accord regarding the appropriate remedies for violations of Section 2 First. There is, thus, no basis for the grant of *certiorari* under Supreme Court Rule 10.1(a).

One year following the Supreme Court's decision in *Brotherhood of R.R. Trainmen v. Chicago River*, 353 U.S. 30 (1957), the Fifth Circuit held in *Louisville & N.R.R. Co. v. Brown*, 252 F.2d 149, 155 (5th Cir.) *cert. denied*, 356 U.S. 949 (1958) that monetary damages were not recoverable by a carrier for a strike which could also be enjoined under *Chicago River* as being over a minor dispute and in violation of § 2 First of the RLA. In the 34 years since, there have been no cases holding contrary to the decision in *Brown*. In fact, the current viability of this holding has been twice reaffirmed in the last year by the only two other Appellate Court decisions, which have considered the issue. *BN v. BMWE*, 961 F.2d 86 (5th Cir. 1982) (the decision below); *CSX v. Marquar*, No. 91-5689, slip op., —— F.2d —— (6th Cir. November 13, 1992).

In considering the present viability of its previous *Brown* decision, the Fifth Circuit in *BN v. BMWE*, the case below, noted that in the years following *Brown* "other courts have recognized *Brown* as holding that there is no cause of action against a union for damages for a breach of the § 152 First duty." *Id.* at 88 (*See* cases cited at Fn. 7 in Court's Opinion). The court below also noted that not only has the Fifth Circuit's decision in *Brown* been followed by other courts, but that in the years since, "there are *no* reported cases awarding damages for the breach of the § 152 First duty." *BN v.*

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[12] *C.S.X. Transportation, Inc. v. Marquar et al.*, No. 91-5689, slip op., —— F.2d —— (6th Cir. November 13, 1992).

[13] *AFA v. Horizon Air*, 976 F.2d 541, 551 (9th Cir. 1992).

BMWE, *supra*, 961 F.2d at 89 fn. 15. Similarly, with respect to BN's claim under § 153 First, the Fifth Circuit below stated that "We are also not aware of any case in which damages have been awarded for violation of § 153 First (i)." *Id.* at 89. In refusing BN's alternative argument to overrule *Brown*,[14] the Fifth Circuit went on to state that "BN has not directed the attention of this Court to any Supreme Court decision holding that monetary relief is available for the breach of the 152 First duty." *Id.* at 89. Accordingly, the Fifth Circuit's decision represents an acknowledgement that this is a well-settled area of federal labor law, where no court has rendered a contrary decision over the sixty-six years of *jurisprudence* under the RLA, nor has any court held differently than the rule as established over thirty-four years ago in the *Brown decision.*

In reaching the same conclusion the Sixth Circuit in *CSX v. Marquar*, No. 91-5689, slip op. at 45 (6th Cir. November 13, 1992)[15] noted that since *Brown*, "No published opinion has ever held that a carrier may recover damages against a union for an illegal strike over a minor dispute." More generally, the Sixth Circuit also noted that:

> In the sixty-six year history of the RLA, no Federal Court has published an opinion holding that a union may recover damages from a railroad, or that a railroad may recover damages from a union. On rare occasions, *individual employees* have been allowed to recover damages from their unions or their carriers,

[14] Petitioner has *twice* sought *en banc* hearing of this case in the Fifth Circuit to consider over-ruling *Brown*, once for initial hearing of the appeal and later for review of the panel decision. On both occasions, not one of the active Judges on the Fifth Circuit considered this case of such significance to even request that the Court be polled on whether to hear the case *en banc*. *See* Appendix C to Petition.

[15] Citation to the decision in *CSX v. Marquar*, *supra*, will to be to the opinion of Ralph B. Guy, Circuit Judge, with whom Judge Jones concurred, who delivered the opinion of the Court holding that it would be inappropriate for the Federal Courts to imply a strike damage remedy against a union under the RLA.

> *but the Courts have not permitted the railroads and unions to use the club of damages against each other.* [emphasis added]

CSX, *supra*, No. 91-5689, slip op. at 43. Although acknowledging that the Fifth Circuit's decision in *Brown* was not binding on it, the Sixth Circuit in *CSX* concluded that "Since at least 1958, the RLA 'common law' has been that a railroad may not recover damages for a strike over a minor dispute." *CSX*, *supra*, slip op. at 46.[16] The *CSX* court found further that no demonstration had been made that the injunctive remedies which have been deemed appropriate for sixty-six years are no longer sufficient, and that there were strong policy reasons grounded in the RLA, which would make the imposition of a damage remedy in these circumstances inappropriate.[17] Accordingly, the Sixth Circuit in *CSX* reached the same result as the Fifth Circuit in *Brown* and *BN v. BMWE* and concluded that "the common law that has emerged [under the RLA] does not contemplate awards of damages between unions and railroads." *Id.* slip op. at 43.

Brown and *BN v. BMWE* in the Fifth Circuit, and *CSX* in the Sixth Circuit, are the only federal appellate cases to directly address the issue presented. While both Circuits use a somewhat different approach to arrive at the same conclusion, they both clearly hold that monetary

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[16] The 6th Circuit stated:

> Congress envisioned that the courts would set up a body of law to enforce the RLA. The resulting body of the law has not permitted railroads and unions to recover damages against each other generally and, particularly, in the situation presented in this case. After 66 years, a Court should be reluctant to change the balance that has been struck between railroads and unions.

CSX, *supra*, No. 91-5689, slip op. at 46.

[17] Citing this Court's previous decision in *IBW v. Foust*, 442 U.S. 42, 47 (1979) the *CSX* court stated that "damages awards between railroads and unions are inappropriate because they threaten the delicate balance intended by the RLA." *CSX*, *supra*, No. 91-5689 slip op. at 44.

damages are not recoverable by a carrier against a union which engages in a strike in violation of § 2 First.

While the only cases directly on point are in the Fifth and Sixth Circuits, by analogy, denying a damages remedy as being inappropriate is also supported by the reasoning of a recent decision of the Ninth Circuit. *AFA v. Horizon Air*, 976 F.2d 541, 551 (9th Cir. 1992). In that case a union was denied monetary relief in the form of attorneys' fees (apparently damages were not sought) against a carrier who had violated § 2 First by negotiating without the intent of ever reaching an agreement. In that case, fees were sought against the carrier on the same basis that damages are being sought against the union in this case, *i.e.* that this Court's decision in *Chicago and Northwestern Railway v. UTU*, 402 U.S. 570, 577 (1971) allows the Courts to fashion remedies for violations of the RLA "by whatever appropriate means might be developed on a case by case basis." In its decision, the Ninth Circuit discusses the policy reasons supporting denial of attorneys fees under the RLA, which reasoning would equally apply to the recovery of any other forms of monetary relief, including damages, between unions and carriers under the RLA. Thus, while not directly on point, the Ninth Circuit's decision in *Horizon Air* is certainly consistent with the long line of authority under the RLA, holding that injunctive relief, channeling the parties into the resolution of their disputes under the procedures of the RLA, is the limit of appropriate remedies. The reasoning of that case thus supports the rule that the imposition of monetary remedies, whether they be damages or attorney's fees, as between carriers and unions, are not appropriate under the RLA.

Not only are the only two Circuit Courts to have directly considered this question in accord, but there are no District Court decisions in any other circuits which

have reached a contrary result.[18] In *National Airlines, Inc. v. ALPA*, 431 F. Supp. 53 (S.D. Fla. 1976), which is the only other District Court case to have directly addressed this issue, the District Court noted that in the eighteen years since the *Brown* decision, all the cases involving the judicial enforcement of § 2 First "confined § 2 First remedies to those partaking of the nature of equitable injunctive relief." *Id.*, 431 F.Supp. at 54. Noting the apparent congressional satisfaction with the *Brown* decision, evidenced by the fact that in those 18 years "Congress has [not] enacted legislation which even suggests its intent to create a right of action for damages," and that "the policy considerations underlying the *Brown* decision are as tenable today as when *Brown* was decided," the Court denied a similar damage claim. *Id.* at 55.

Accordingly, not just every Circuit Court decision, but literally every judicial decision to address this issue in the 66 years of RLA *jurisprudence* has consistently held that damages are not recoverable in these circumstances. Thus, there is no conflict which this Court need resolve under Supreme Court Rule 10.1(a).

II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY APPLICABLE DECISIONS OF THE SUPREME COURT

This case does not present the Court with the opportunity to reverse a decision which conflicts with decisions of this Court. *See* Supreme Court Rule 10.1(c). No decision of this Court has ever countenanced the resolution of disputes between labor organizations and carriers under the RLA by the imposition of damage awards.

[18] The only reported case where strike damages were ever *awarded* was *Denver & Rio Grande Western Railroad v. Brotherhood of Railroad Trainmen*, 58 L.R.R.M. 2568 (D. Co. 1965) (not officially reported), *rev'd on other grounds*, 367 F.2d 157 (10th Cir. 1966), *rev'd*, 387 U.S. 556 (1967). That case, however, has no precedential value for the reasons stated by the Fifth Circuit in *BN v. BMWE*, *supra*, 961 F.2d at 89 fn 15, and by the Sixth Circuit, in *CSX*, *supra*, No. 91-5689, slip op. at 46 fn 4, in their discussions of that case.

Rather, this Court's decisions under § 2 of the RLA reveal the careful circumscription of the available remedies to an injunction channeling the parties back into compliance with their RLA duties and resolution of their disputes under the workings of the Act. The Supreme Court cases cited by Petitioner are, thus, inapposite.

In its Petition, BN argues that *certiorari* should be granted, because the Fifth Circuit's decision below conflicts with certain Supreme Court decisions. However, when one focuses on the cases cited by BN, it is evident that all the cases cited are inapposite to the issue of the recovery of legal damages under the RLA. Three of the Supreme Court cases relied upon by BN arise under the RLA, but each deals solely with the issue of whether the Courts have authority to issue *injunctive* relief to enforce the duties specified in Section 2 of the RLA. Not one even remotely deals with the issue of whether damages are recoverable.[19]

Of the three Supreme Court RLA injunction cases cited by BN, it principally relies upon *Chicago & N.W.R.W. v. UTU*, 402 U.S. 570 (1971). BN argues that *UTU* supports the implication of a damage remedy based on the

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[19] In each of the cases cited by BN there was no issue of monetary relief and the quotes that BN relies on are solely within the context of the Court's authority to enter injunctive relief. *See Texas and New Orleans Railway Co. v. Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548 (1930) (*injunction* action to enforce § 2 Third of the RLA, which protects the right of the employees and the carrier to designate their representatives without influence or coercion from the other party); *Virginian Railway Co. v. System Federation #40*, 300 U.S. 515 (1937) (*injunction* action to enforce § 2 Ninth of the RLA to require the carrier to meet and treat with the employees' representative as certified by the National Mediation Board); *Chicago and Northwestern Railway Co. v. United Transportation Union*, 402 U.S. 570 (1971) (*injunction* action where issue was whether a strike injunction could be entered to enforce § 2 First, in the face of the prohibitions of the Norris-LaGuardia Act, 29 USC § 101, *et seq.*, after conclusion of the RLA procedures when the union would otherwise be free to exercise self-help, but where it was alleged that the union failed to negotiate properly during those procedures).

Court's statement that Section 2 First was "designed to be a legal obligation, enforceable by whatever appropriate means might be developed on a case by case basis." Id. at 577. In that case the Court was struggling with whether, in the unique facts presented there, a strike could be enjoined, despite the strike injunction prohibitions of the Norris Laguardia Act, 29 USC § 101 *et seq.* The context of the quote relied on by BN is not whether damages or monetary relief may be assessed, but what manner of appropriate *injunctive* relief a court could fashion to enforce § 2 First to meet the particular needs of the case at bar. It is simply a misuse of *UTU* to cite it for the proposition that damage awards may be imposed to resolve disputes under the RLA when monetary relief was never even at issue in that case. In fact, a correct reading of *UTU* reveals that it addressed no more than whether an injunction may issue in the face of the Norris Laguardia Act prohibitions when a strike injunction is the "only practical, effective means of enforcing" Section 2 First. *Id.* at 583.[20]

Similarly, BN's reliance on quotations from *Steele v. L. & N.R.R. Co.*, 323 U.S. 192 (1944) is entirely off point. *Steele* was a fair representation case which deals with the relationship between a union and those it represents and not with the relationship between a union and rail carriers established by the RLA.[21] Since a fair representation case is more akin to a breach of fiduciary duty action, *see Teamsters v. Terry*, 494 U.S. 558, 567-568 (1990), it is entirely inapposite to a case involving the relationship between carriers and labor organizations

[20] If BN's reading of *UTU* was correct then the union in *AFA v. Horizon Air, supra*, 976 F.2d at 551 would not only be entitled to attorney's fees, but also to recover as damages its negotiation expenses incurred while the carrier was violating § 2 First by negotiating without the intent to reach an agreement.

[21] As the Court stated in *CSX, supra*, slip op. at 43:

> On rare occasions *individual employees* have been allowed to recover damages from their unions or their carriers, but the Courts have not permitted the railroads and unions to use the club of damages against each other.

under the RLA, which is not a fiduciary relationship, and where policy concerns are at issue involving the maintenance of a balance between the two in addressing the resolution of disputes.

Finally, BN argues that the *Brown* holding is inconsistent with Supreme Court's recent decision in *Franklin v. Gwinnette County Public Schools*, —— U.S. ——, 117 L.Ed.2d 208 (1992). Once again *Franklin* is not a case dealing with the enforcement of the duties under the RLA, but is an action arising under an entirely different line of cases dealing with the availability of damages under Title IX of the Education Amendments of 1972, 20 USC § 1681-1688. As the Fifth Circuit held below, "even if this Court were considering the issue on a clean slate, *Franklin* would not control." *BN v. BMWE*, *supra*, 961 F.2d at 89 fn. 9.[22]

Moreover, *Franklin* requires the presumption of a damages remedy only when such a remedy is "appropriate" and "unless Congress has expressly indicated otherwise." *Franklin*, *supra*, —— U.S. ——, 117 L.Ed.2d at 217. As demonstrated by the Sixth Circuit in *CSX*, such a remedy would not be appropriate here because it would upset the careful balance of interests necessary to achieve the purposes of the RLA. *CSX*, *supra*, No. 91-5689, slip op. at 44, citing *IBEW v. Foust*, *supra*, 442 U.S. at 48-50-51; *see also* discussion at section III.B. *infra*, in this brief.

Moreover, there is strong indication that Congress has "indicated otherwise," which also supports the conclusion that a damage remedy is also inappropriate. And therefore, *Franklin* does not mandate implication of a damage remedy. As recognized by the Sixth Circuit in *CSX*, this Circuit's *Brown* holding has now become well entrenched as part of the federal common law under the RLA. *CSX*, *supra*, No. 91-5689, slip op. at 46-47. The failure of Congress to legislatively reverse *Brown* in the 34 years since should be taken as indication that Congress did not intend

[22] *See* discussion at III A *infra* and footnote 25 *infra*.

a damage remedy in these circumstances and as an expression of Congressional policy on this issue. As this Court stated in another context, "at this advanced stage of the RLA's development. . . it is for Congress, and not the courts, to strike the balance between the uncontrolled power of management and labor to further their respective interests." *Burlington Northern v. BMWE*, 481 U.S. 429, 452-53 (1987). Thus, even assuming, without conceding, that *Franklin* would apply to an RLA case, *Franklin* does not require the implication of a damage remedy, because Congress has "indicated otherwise" as evidenced by (1) its refusal to extend to cases under the RLA the damage action it created for cases arising under the National Labor Relations Act ("NLRA"), and (2) its expression of satisfaction with the *Brown* rule by allowing it to become well embedded in the RLA common law by refusing to legislatively overturn it in thirty-four years.

In sum, as stated by the Fifth Circuit in the decision below, "BN has not directed the attention of this Court to any Supreme Court decision holding that monetary relief is available for a breach of the § 152 First duty." *BN v. BMWE*, *supra*, 961 F.2d at 89. Since the decision below is not inconsistent with an previous decision of the Supreme Court, there is no reason to grant *certiorari* on that basis under Supreme Court Rule 10.1(c).

III. THE DECISION BELOW PRESENTS AN ISSUE THAT HAS BEEN LONG SETTLED AND IS, THUS, NOT AN IMPORTANT QUESTION OF FEDERAL LAW REQUIRING SUPREME COURT RESOLUTION

This case does not present a question involving an important issue of federal law which has not been, but should be, resolved by this Court, which would justify granting the writ under Supreme Court Rule 10.1(c). As aptly stated by the Sixth Circuit "the Courts have not permitted the railroads and the unions to use the club of damages against each other." *CSX*, *supra*, No. 91-5689, slip op. at 43.

Thus, the reasons underlying the holding of both the Fifth and Sixth Circuit [23] are based upon the recognition that it would be inappropriate for the Courts to imply a damage remedy, or a damage cause of action, under the RLA, because to do so would (1) be destructive of the RLA's procedures and frustrate the achievement of its stated policy objectives; and (2) involve the courts "at this advanced stage of the RLA's development" [24] in a matter which should be properly left for Congress to consider in carrying out its legislative function of establishing labor policy. Viewed in this sense, the holdings in both the Fifth and Sixth Circuits are based on identical propositions; i.e. it would be "inappropriate" for the Courts to fashion a damage remedy in these circumstances. Moreover, arming the courts with the power to impose legal damages, would transform judicial enforcement of the RLA from the limited exercise of equity jurisdiction, requiring the parties by injunction to comply with their RLA duties, into a court at law resolving disputes between the parties through the imposition of damage awards. Such a fundamental change in the workings of the RLA should be left to Congress.

A. The Courts Have Consistently Held That Creation of a Strike Damage Remedy Under the RLA Is a Matter for Congress and Not the Courts

The fact that Congress has declined to legislatively reverse the *Brown* holding during the thirty-four years which have elapsed since its decision is compelling evidence that Congress is satisfied with the state of the common law under the RLA with respect to the extent of available remedies for enforcement of § 2 First. Thus, one may reasonably conclude that by allowing *Brown* to

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[23] These policy reasons also underlie the decision of the Ninth Circuit in *AFA v. Horizon Air*, *supra*, 976 F.2d at 551 (9th Circuit 1992) denying a union monetary relief in the form of attorneys fees for a carrier's violation of § 2 First, even in the face of the argument that the Court could imply such a remedy under *Chicago & North Western*, *supra*, 402 U.S. at 577.

[24] *Burlington Northern R.R. v. BMWE*, 481 U.S. 429, 452 (1987).

stand as the law, Congress is indicating that damages should not be available in these circumstances.

Thus, even assuming that this Court's decision in *Franklin v. Gwinnette County*, —— U.S. ——, 117 L.Ed.2d 208 (1992), applies to RLA cases, *Gwinnette's* presumption of the availability of "all appropriate" remedies "unless Congress has expressly indicated otherwise", *Gwinnette, supra*, 117 L.Ed.2d at 217, would not require the implication of a damage remedy here, since the holdings of the Fifth and Sixth Circuits stand for the proposition that a damage remedy is both not "appropriate" in these circumstances, and the acquiscence of Congress by allowing *Brown* to remain the law for over thirty-four years indicates that Congress does not want remedies under the RLA extended to damages, at least in this particular circumstance.

Indeed, the *Brown* Court, being sensitive to its role as an interpreter and not a maker of law and seeking to avoid usurping the function of Congress to establish labor policy, noted that "where Congress sought to set up a right of acton for damages for breach of duty in other *labor management* situations, it enacted a statute expressly spelling out the nature of the right of action." [emphasis added]. *Brown, supra*, 252 F.2d at 155. The *Brown* Court then cited to § 303 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 187, which specifically created a cause of action for damages for a strike in violation of § 8(b)(4) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(b)(4). Since damages for strikes in violation of the NLRA are not recoverable, in the absence of Congressional enactment of § 303, no cause of action for damages would exist. Similarly, when Congress decided to authorize the recovery of damages for a strike in violation of a collective bargaining agreement, enabling legislation was enacted specifically creating a right of action for damages. *See* § 301 at the LMRA, 29 U.S.C. § 185; *Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212 (1979). Thus, although having the opportunity during the passage of the LMRA to extend the remedy for strike damages to cases under the

RLA, Congress specifically declined to do so. Considering that the labor statute which specifically authorizes a damage remedy for illegal strikes also specifically excludes RLA carriers from its scope, *See* 29 U.S.C. § 182, there is clear indication that Congress did not intend to extend such damage claims to cases under the RLA.[25]

The continued refusal of Congress since the passage of the LMRA to legislatively overrule *Brown*, establishes *Brown* as both an element of the common law of the remedies available for judicial enforcement of § 2 First, but also as an indication that *Brown* comports with Congressional policy regarding the remedies which should be available, and not available, for the judicial enforcement of the RLA. After more than thirty years of limiting enforcement of the RLA, as between carriers and unions, to injunctive relief, it would be a usurpation of the function of Congress to establish labor policy for the *Brown* holding to be reversed at this late date. Indeed, to imply a damage remedy in these circumstances would be tantamount to judicial enactment of § 303 of the LMRA into the RLA.

Even without respect to whether the legal basis for the *Brown* Court holding remains sound (which BMWE submits it is), over the passage of years this holding has embedded itself in the common law developed by the courts in the interpretation of the RLA. As the District Court noted in *National Airlines*, Congress must have been satisfied with the state of this common law since in the twenty years since the *Brown* decision "Congress [has not] enacted legislation which even suggests its intent to create a right of action for damages." *National Airlines*, *supra*, 431 F. Supp. at 54.

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[25] In *Gwinnette*, this Court presumed that Congress legislated with full knowledge of the Court's prior decisions. Thus in leaving judicially crafted remedies undisturbed, the Court concluded that Congress did not intend to modify the available remedies. Likewise Congress' satisfaction with *Brown*, and its progeny, manifest approval of the now "traditional rule" regarding the lack of a damage remedy between carriers and unions under the RLA.

Similarly, the Sixth Circuit in *CSX*, *supra*, No. 91-5689, slip op., 46-47 is in accord. In *CSX* the Sixth Circuit held that since the limitation against the recovery of strike damages has become part of the common law under the RLA, it should be up to Congress and not the courts to create a damage remedy. *Id.* at 47. In *CSX* the court notes that in *Burlington Northern v. BMWE*, 481 U.S. 429 (1987), the Court was faced with the question of whether the RLA implicitly bars secondary picketing. Although there is no prohibition in the RLA against secondary activity similar to that found in the National Labor Relations Act ("NLRA"), 29 USC § 158(b)(4), the Court refused to imply a similar bar under the RLA. In language applicable here, which is quoted by the Sixth Circuit in *CSX*, the Supreme Court stated:

> We decline, *at this advanced stage of the RLA's development*, to find in it an implied limit on a union's resort to secondary activity. Instead, "if Congress should now find that the abuses in the nature of secondary activities have arisen in the railroad industry . . . *it is for Congress, and not the Courts, to strike the balance 'between the uncontrolled power of management and labor to further their respective interests.'*"

Burlington Northern, *supra*, 481 U.S. at 252-53 (citation omitted) [emphasis added]. Thus, the Sixth Circuit in *CSX* came to the same conclusion as the Fifth Circuit in *Brown* that if present circumstances in the railroad and airline industry merit the imposition of a damage award, the "argument properly should be made to Congress." *CSX Transportation*, *supra*, No. 91-5689, slip op. at 47.

B. The Courts Have Consistently Held That Creation of a Strike Damage Remedy Under the RLA Is Inappropriate Because It Would Be Destructive of the Proper Functioning of the RLA

The Fifth and Sixth Circuit holding that the recovery of strike damages is not an appropriate remedy is ultimately based upon the recognition that a damage remedy

would be destructive of fundamental policy considerations underlying the RLA and would undermine the balance it created between the interests of employees and the carriers. It is these policy considerations which have prompted Congress to decline to legislatively reverse *Brown* over the last three decades. Moreover, BN has shown no reason for judicially deviating from the rule by demonstrating that the remedies appropriate for sixty-six years are no longer sufficient.

1. *The Courts recognize that after sixty-six years the implication of a damage remedy which could undermine RLA policy objectives requires a showing that injunctive remedies are no longer sufficient*

Noting that "the Courts have not permitted the railroads and unions to use the club of damages against each other", *CSX*, *supra*, No. 91-5689, slip op. at 43, the Sixth Circuit concluded in *CSX* that "damages awards between railroads and unions are inappropriate because they threaten the delicate balance intended by the RLA." *Id.* at 44. In reaching that conclusion the *CSX* Court cited to this Court's decision in *IBEW v. Foust*, 442 U.S. 42, 47 (1979), which counseleld that "a court's task in enforcing the RLA 'is to implement a remedial scheme that will best effectuate the purposes of the Railway Labor Act, recognizing that the overarching legislative goal is to facilitate collective bargaining and to achieve industrial peace.' " *CSX*, *supra*, slip op. at 44, quoting, *Foust*, *supra*, 442 U.S. at 47. Accordingly, just as this Court concluded in *Foust* that punitive damages were not recoverable against a union in a duty of fair representation case, the Sixth Circuit concluded that a strike damage award against a union in an RLA case is likewise inappropriate, because it could also "impair a union's financial stability and thereby upset the careful balance of interests necessary to achieve the purposes of the RLA." *CSX*, *supra*, slip op. at 44.

Similarly, the Fifth Circuit's decision in *Brown*, and thus its decision in *BN v. BMWE* below, is grounded on the identical policy concerns expressed by this Court in *Foust*, i.e. a damages remedy could impair the labor management relationship intended by the RLA. Recognizing that this was the same policy basis underlying the *Brown* holding, the District Court in *National Airlines* stated:

> . . . [T]he Court is of the opinion that *policy considerations underlying the Brown decision are as tenable today as when Brown was decided.* The life cycle of labor-management bargaining is heated and oftentimes results in bitter accusations. Representatives attempt to secure the best possible terms for their respective sides. To create a right of action in favor of an employer against a union and its collective bargaining representatives for losses the former incurs in the course of the collective bargaining process would, in effect, give the employer a weapon with which to keep the unions and their agents "in line." Surely, neither Congress nor the Appellate Courts would fashion a remedy which would give the employer a lever upon which to gain such an unfair advantage. [Emphasis added].

National Airlines, supra, 431 F.Supp. at 54.

In the years since *Chicago River* held that a strike over a minor dispute could be enjoined, the Courts have exercised judicial restraint, showing sensitivity to these policy concerns (which are also expressed by Congress in the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.*) and, therefore, have limited the exercise of their equitable powers in granting strike injunctions to the extent necessary to fulfill the RLA's purposes. Nevertheless, like the Plaintiff in *National Airlines*, BN remains "[u]nsatisfied with the injunctive relief and favorable results therefrom" and argues that complete relief and fulfillment of the RLA's purposes requires the imposition of damages. However, complete relief aimed at serving the RLA's goals requires only the restoration of labor peace through a strike injunction and does not require the shifting of

the incidental costs of the employees' protected activity to the employees themselves. As noted in *National Airlines*, imposing this burden on the employees would simply cater to the "unmitigated desire for vengeance" of the carrier and would not serve the purposes of the RLA. *National Airlines*, *supra*, 431 F.Supp. at 54.

As the Sixth Circuit remarked in *CSX*, the body of common law that has developed with respect to the enforcement of the RLA "has not permitted railroads and unions to recover damages against each other generally, and, particularly, in the situation presented in this case." *CSX*, *supra*, No. 91-5689 at 46.

The Sixth Circuit goes on to state that "after 66 years, a court should be reluctant to change the balance that has been struck [by the RLA] between railroads and unions," and that "at a minimum" before making such a change, there should be a "demonstrat[ion] why the remedies that have been appropriate for 66 years are no longer good enough." *CSX*, *supra*, No. 91-5689, slip op. at 46.

2. ***Petitioner has made no showing that injunctive relief is no longer sufficient and its argument is premised on the false legal conclusion that there is "an illogical asymmetry" in the remedies available under the RLA and the false factual assumption that there is a need for deterrent measures***

BN argues that injunctive remedies are no longer sufficient and that a change should now be made after 66 years to imply a damage remedy based on two false legal and factual assumptions. First BN falsely asserts that an "illogical asymmetry" exists under present law whereby "unions may be awarded the full range of relief, including damages, for a carrier's violation of its duties under the RLA, but carriers are not allowed this full range of remedies when a union violates its duties under the RLA." (*See* Petition pp. 4, 10-11, 23-25). Second, BN makes the false factual assertion that there

is a basis in this record for finding that, despite the availability of a strike injunction,[26] labor organizations are undeterred from engaging in illegal self-help without the threat of a damage remedy. (See Petition pp. 10, 25-26).

As to the first point, it is simply a misstatement of the law to say that unions may recover damages against carriers under the RLA, but that carriers may not do the same. BN's false assertion that an "illogical asymmetry" exists can be summarily dismissed by the Sixth Circuit's statement in *CSX* where, after examining all of the relevant cases under the RLA, the court stated:

> In the 66-year history of the RLA, no *federal court has published an opinion holding that a union may recover damages from a railroad* or that a railroad may recover damages from a union. [Emphasis added]

CSX, supra, No. 91-5689, slip op. at 43.[27]

As to BN's second basis for granting *certiorari*, i.e., the alleged need for a deterrent to illegal strikes, the Sixth Circuit in *CSX* disposes of this point by stating that "we have no reason to believe that the need for damages to deter illegal strikes over minor disputes is any greater today than it was when *Brown* was decided in 1958, or when the RLA was enacted in 1926." *CSX, supra*, No.

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[26] See *Brotherhood of Railroad Trainmen v. Chicago River*, 353 U.S. 30 (1957).

[27] Apparently BN seeks to support its misstatement of the law in this regard by reference to the Fifth Circuit's decision in *United Industrial Workers of the Seafarers Int'l Union v. Galveston Wharves*, 400 F.2d 320 (5th Cir. 1968) *cert. den.* 395 U.S. 905 (1969). (*See* Petition pp. 23-25). However, as noted by the Sixth Circuit in *CSX, supra*, No. 91-5689 slip op. at 43, fn 3, and by the Fifth Circuit in the case below, *Burlington Northern v. BMWE, supra*, 961 F.2d at 88-89, *Galveston Wharves* is not relevant to this issue, since it did not deal with the issue of the recovery of compensatory damages between carriers and unions, but rather with the entitlement to recover the *equitable* remedy of back pay by *individual employees*.

91-5689, slip op. at 46. Similarly, the factual record below, which concerned only whether BMWE had the right to strike based on the District Court's determination of whether the dispute was minor or major, is likewise devoid of any basis for BN's assertion that the lack of a damage remedy has left labor organizations, in general, undeterred from illegal strikes which after sixty-six years is suddenly a problem requiring remediation. Indeed these factual assertions are both unestablished and untrue.[28]

Finally, even assuming BN's unestablished factual allegations regarding the need for deterrent measures were true, for the reasons stated by the Sixth Circuit in *CSX*, *supra*, No. 91-5689, slip op. at 47, BN's argument should properly be addressed to Congress, and not the courts.

3. *The Courts and commentators recognize that a damage remedy here would be inappropriate, because it would be destructive of the RLA dispute resolution procedures and undermine its policy objectives*

Quite apart from whether there exists any basis for Congress to consider creating a damage remedy, all the courts and commentators on the RLA that have considered this issue, have concluded that to imply a damage remedy in this context in fact would be destructive of the Act's procedures, and frustrate its ultimate policy objectives.[29] In language equally applicable to this case, the Sixth Circuit in *CSX* stated:

> By contrast, the concerns that weigh against such a remedy are as present today as they ever were. In the volatile atmosphere of labor-management rela-

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[28] See discussion at "B. Statement of Facts, 1. Petitioner's Misstatement of the Facts as Established in the Record," *supra*, pp. 4-5.

[29] *See also*, the discussion of the Ninth Circuit in *Horizon Air*, *supra*, 979 F.2d at 551 regarding the similar policy reasons which make inappropriate a monetary award of fees to a union for a carrier's violation of Section 2 First.

> tions, the threat of a damages action could upset the balance intended by the RLA.
>
> The problem is particularly acute in a case such as this where the union cannot know with certainty at the time it calls a strike whether a court will later decide that the dispute is minor or major. If damages were available, and the union guessed wrong, it would be liable for damages that could deplete the union treasury and impair its effectiveness as the collective bargaining agent. *Cf. Foust*, 442 U.S. at 50-51. This threat of crushing financial loss allows the carrier to keep the union "in line" and the employees off the picket line even in cases where the dispute is later adjudged to be major. See *National Airlines*, 431 F. Supp. at 54.

CSX, supra, No. 91-5689, slip op. at 46-47.

Contrary to BN's factual assertions, which are unsupported by the record or any findings of the courts below, BMWE reasonably believed that this was a major dispute over which it had a right to strike. At that time, BMWE did not have the benefit of a court at its elbow to evaluate and rule upon the propriety of its conclusion that the dispute was major. As the court held in *CSX*, if damages were available, a union would risk, in the exercise of lawful self help, exposure to damages which could bankrupt it, making it incapable of carrying out its statutory duty of representing the employees under the RLA. This would have a chilling effect on the exercise of self-help in those circumstances when it has been deemed lawful and necessary for the proper functioning of the RLA over the past sixty-six years. *See Shoreline, supra*, 396 U.S. at 154-55.

These policy concerns have also been recognized by commentators on the RLA. In his *Principles of Railroad and Airline Labor Law*, which was cited with approval by the Fifth Circuit in the case below, *BN v. BMWE*, *supra*, 961 F.2d at 89 fn. 15, Harry Lustgarten, after noting that no case had ever allowed the recovery of such damages, stated:

> It appears unlikely, moreover, that the courts in the future would be inclined to allow such damages in view of the potential impact it might have on the union's ability to represent the employees.[30]

Accordingly, the Fifth and Sixth Circuit decisions holding a damage remedy inappropriate in these circumstances are based on sound policy reasons underlying the RLA and which have become well-settled elements of the RLA common law for over three decades. Thus, this case does not present a circumstance where writ of *certiorari* should be granted under Supreme Court Rule 10.1(c) to resolve an important unsettled issue of federal law.

CONCLUSION

For these reasons, the petition for writ of *certiorari* should be denied.

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[30] Harry Lustgarten, *Principles of Railroad and Airline Labor Law*, RALL Publications, p. 157 (1984). Elaborating on the compelling policy reasons against the creation of a damage remedy under the RLA in these circumstances, Lustgarten states:

> The very size of the potential damages arising from an unlawful strike tends to mitigate against allowing a carrier to recover them from a union. Even for the relatively short period required to obtain an injunction, the damages suffered by a rail carrier would in most cases exceed the financial ability of the union to pay. To allow a carrier to recover such damages, therefore, could threaten the solvency and perhaps the very continued existence of the union. Since it is clearly the policy of the Act to encourage and protect the right of a union to represent the employees, from a public policy standpoint there is little to justify an interpretation of the Act which would permit a carrier, not only to promptly stop an unlawful strike through injunctive action, but to also recover damages in an amount which could threaten the ability of the union to continue to represent the employees.

Id. at 157.

Respectfully submitted,

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December 9, 1992

APPENDIX

Sections 2 First, Sixth, and Seventh of the Railway Labor Act, 45 U.S.C. § 152 provide as follows:

> First. Duty of carriers and employees to settle disputes
>
> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any other carrier growing out of any dispute between the carrier and the employees thereof.
>
> . . . .
>
> Sixth. Conference of representatives; time; place; private agreements
>
> In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden

No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

No. 92-606

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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December 9, 1992

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No. 92-606

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BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, *et al.*,

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On Petition For A Writ Of
Certiorari To The United States Court Of Appeals
For the Fifth Circuit

THE ASSOCIATION OF AMERICAN RAILROADS' AND AIRLINE INDUSTRIAL RELATIONS CONFERENCE'S MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION

The Association of American Railroads ("AAR") and the Airline Industrial Relations Conference ("AIRCON") respectfully move this Court for leave to file the attached brief *amicus curiae* in the above-captioned matter:

1. AAR and AIRCON obtained the consent of the Petitioner to file a brief *amicus curiae*. AAR and AIRCON requested the consent of the Respondents Brotherhood of Maintenance of Way Employes ("BMWE"), Ben Ochoa, E.R.

Maintenance of Way Employes ("BMWE"), Ben Ochoa, E.R. Spears, Paul S. Swanson, and Bruce G. Glover, who are General Chairmen of the BMWE, to the filing of a brief *amicus curiae* in support of the Petitioner Burlington Northern Railroad Company ("BN"). The Respondents refused to give consent, stating that they did not believe an *amicus* brief was appropriate at this stage of the proceeding.

2. As stated in the Rules of the Supreme Court, "[a]n *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court." Sup. Ct. R. 37.1. Granting AAR and AIRCON leave to file a brief *amicus curiae* will greatly assist the Court in ruling on BN's petition. AAR and AIRCON and their members have a vital interest in the question for review presented in this case -- the available remedies for an illegal strike under the Railway Labor Act ("RLA"). Together, AAR's and AIRCON's members include most of the employers subject to the RLA, which regulates labor relations only in the railroad and airline industries. AAR's and AIRCON's brief *amicus curiae* will furnish this Court with a broader perspective than the parties can provide on the important issue addressed in the Fifth Circuit's decision, an issue which the Court has never addressed. AAR and AIRCON will provide the Court with an industry-wide viewpoint on the issue and the impact of the Fifth Circuit's decision on the day-to-day operations of the nation's airlines and railroads.

3. As explained in the brief *amicus curiae*, the Fifth Circuit's decision will have serious implications for AAR's and AIRCON's members and that decision requires Supreme Court review. The Fifth Circuit has announced a rule of law that monetary remedies are never available for a strike which violates the RLA minor disputes procedures. Absent Supreme Court review, the Fifth Circuit's ruling will undermine the effectiveness of the RLA minor dispute procedures, which, as this Court has

repeatedly recognized, are fundamental to the RLA's central purpose of avoiding interruptions to rail and air carrier operations and upon which the nation's rail and air carriers depend for peaceful dispute resolution.

4. Briefs *amicus curiae* by industry have been filed in support of petitions for certiorari in prior cases involving important issues under the RLA. *See, e.g.*, Brief of *Amicus Curiae* National Railway Labor Conference in Support of Petitioner in *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299 (1989). Similarly, granting AAR and AIRCON leave to file a brief *amicus curiae* in this case will aid the Court's consideration of BN's petition for certiorari.

5. Respondents will suffer no prejudice if this Court grants AAR and AIRCON leave to file a brief *amicus curiae*.

Therefore, AAR and AIRCON respectfully request leave to file a brief *amicus curiae* in support of the Petitioner.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. INTEREST OF AMICUS CURIAE 1

II. SUMMARY OF ARGUMENT 5

III. ARGUMENT 6

A. *BN* Is Contrary To *Franklin* And Other Precedents Of This Court 6

B. *BN* Is Contrary To The Legislative History, Purpose And Structure Of The RLA 9

C. Supreme Court Review Is Necessary To Give Guidance To Lower Courts 11

IV. CONCLUSION 17

TABLE OF AUTHORITIES

CASES **Page**

Belton v. Air Atlanta, Inc.,
647 F. Supp 28 (N.D. Ga. 1986) 12

Brady v. Trans World Airlines, Inc.,
223 F. Supp. 361 (D. Del. 1963), *aff'd*,
401 F.2d 87 (3rd Cir. 1968), *cert. denied*,
393 U.S. 1048 (1969) 12

Brotherhood of Locomotive Eng'rs v. Baltimore & Ohio R.R., 372 U.S. 284 (1963) 15

Brotherhood of Locomotive Eng'rs v. Louisville & Nashville R.R.,
373 U.S. 33 (1963) 10,14

Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R.,
353 U.S. 30 (1957) 2, 6, 14

Brotherhood of Ry. Carmen v. Delpro Co.,
579 F. Supp. 1332 (D. Del. 1984) 12

Brown v. World Airways, Inc.,
539 F. Supp. 179 (S.D.N.Y. 1982) 12

Burke v. Compania Mexicana de Aviacion, S.A.,
433 F.2d 1031 (9th Cir. 1970) 12

Burlington N. R.R. v. Brotherhood of Maintenance of Way Employes,
481 U.S. 429 (1987) 9, 15, 16

CASES (con't.) **Page**

Burlington N. R.R. v. Brotherhood of Maintenance of Way Employes, 961 F.2d 86 (1992) ..... *passim*

Chicago & N. W. Ry. v. United Transp. Union, 402 U.S. 570 (1971) 8, 9, 10

Consolidated Rail Corp. v. Railway Labor Executives Ass'n., 491 U.S. 299 (1989) 1, 6, 10, 15

CSX Transp., Inc., v. Marquar, No. 91-5689 (6th Cir. Nov. 13, 1992) ..... *passim*

Denver & R.G.W. R.R. v. Brotherhood of R.R. Trainmen, 58 L.R.R.M. (BNA) 2568 (D. Colo. 1965) *rev'd on other grounds*, 367 F.2d 137 (10th Cir. 1966), *rev'd*, 387 U.S. 556 (1967) 12

Franklin v. Gwinnett County Pub. Schs., 112 S. Ct. 1028 (1992) ..... *passim*

International Ass'n of Machinists v. Central Airlines, Inc., 372 U.S. 682 (1963) 8

International Bhd. of Elec. Workers v. Foust, 442 U.S. 42 (1979) 8, 15

J. I. Case Co. v. Borak, 377 U.S. 426 (1964) 7

Louisville & Nashville R.R. v. Brown, 252 F.2d 149 (5th Cir.), *cert. denied*, 356 U.S. 949 (1958) ..... *passim*

CASES (con't.) **Page**

Maas v. Frontier Airlines, Inc.,
676 F. Supp. 224 (D. Colo. 1987) 12

Marbury v. Madison, 5 U.S. (1 Cranch)
137 (1803) 7, 8

National Airlines, Inc., v. Airline Pilots Ass'n, 431 F. Supp. 53
(S.D. Fla. 1976) 12

Pittsburgh & Lake Erie R.R. v. Railway Labor Executives Ass'n, 491 U.S. 490 (1989) 16

Steele v. Louisville & Nashville R.R.,
323 U.S. 192 (1944) 8

Texas & New Orleans R.R. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 548
(1930) 7, 8

Texas & Pac. Ry. v. Rigsby, 241 U.S. 33
(1916) 7, 14

Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants,
489 U.S. 426 (1989) 17

United Indus. Workers v. Board of Trustees,
400 F.2d 320 (5th Cir. 1968), *cert. denied*,
395 U.S. 905 (1969) 10, 12

United Transp. Union v. Florida E. Coast Ry.,
586 F.2d 520 (5th Cir. 1978) 12

CASES (con't.) **Page**

United Transp. Union v. Grand Trunk W. R.R.,
901 F.2d 489 (6th Cir.), *cert. denied*,
111 S. Ct. 55 (1990) 16

Virginian Ry. v. System Fed'n No. 40,
300 U.S. 515 (1937) 15

STATUTES

Railway Labor Act

45 U.S.C. § 152, Third 12

45 U.S.C. § 152, Fourth 12

45 U.S.C. § 152, Sixth 1

45 U.S.C. § 152, Eleventh 11

45 U.S.C. § 153, First 1

45 U.S.C. § 156 12

45 U.S.C. § 184 1

LAW REVIEW

Richard A. Posner, *Some Economics of Labor Law*,
51 U. of Chicago L. Rev. 988 (1984) 4

I. INTEREST OF AMICUS CURIAE

The Association of American Railroads ("AAR") and Airline Industrial Relations Conference ("AIRCON") and their members have a vital interest in the question for review presented in this case -- the available remedies for an illegal strike over a minor dispute within the meaning of the Railway Labor Act ("RLA"). Together, their members include most of the employers subject to the RLA, which regulates labor relations only in the railroad and airline industries.

The AAR is an unincorporated voluntary association representing the nation's railroads. The AAR's members include all of the nation's major railroads as well as regional rail carriers. The AAR's members employ 90 percent of the nation's rail workers and account for approximately 85 percent of the line haulage and 93 percent of the freight revenues of the nation's railroads. The vast majority of rail workers employed by AAR's members are represented by unions. AIRCON also is an unincorporated voluntary association, whose membership includes every major and national scheduled commercial air carrier operating in the United States. Much of the workforce in the airline industry is also unionized.

Congress, in the RLA, determined that transportation services provided by the railroad and airline industries were so important to the nation's economy that labor disputes in these industries should be channelled into special, statutory dispute resolution mechanisms designed to minimize interruptions to carrier operations, and therefore to commerce. The Act's 'major purpose . . . was 'to provide a machinery to prevent strikes.'" *Texas & New Orleans R.R. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548 (1930). The Act requires that disputes arising from disagreements over the interpretation or application of collective bargaining agreements, so-called "minor disputes," be submitted to binding and peaceful arbitration by specialized arbitration panels called adjustment boards. 45 U.S.C. §§ 152, Sixth, 153, First, 184. *See, e.g., Consolidated Rail Corp. v.*

Railway Labor Executives Association, 491 U.S. 299, 303 (1989) (hereinafter "*Conrail*").

Strikes over minor disputes are prohibited, and it is well settled that carriers have a cause of action implied from the RLA against unions for illegal strikes over minor disputes. *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30 (1957) (hereinafter "*Chicago River*"). The Supreme Court, however, has not had occasion to determine whether a carrier can obtain damages or other monetary relief under the RLA, when injured by a union's violation of the statutory duty not to strike over a minor dispute. Although the availability of damages or other monetary remedies under the RLA has not often arisen, the lower courts have generally ruled that such relief is available to persons injured by a violation of the RLA. The one notable exception is the issue presented here. In 1958, the Fifth Circuit held in *Louisville & Nashville Railroad Co. v. Brown*, 252 F.2d 149 (5th Cir.), *cert. denied*, 356 U.S. 949 (1958) (hereinafter "*Brown*"), that there was no "new statutory right of action for damages" when employees engaged in an illegal strike over a minor dispute. In *Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way Employees*, 961 F.2d 86 (5th Cir. 1992) (hereinafter "*BN*"), the Fifth Circuit followed *Brown* for the simple reason that there had been no intervening decisions by the Supreme Court or any other court allowing such damages. More recently, the Sixth Circuit, with one judge dissenting, reached the same result, in large part because it believed *Brown* to represent the federal common law under the RLA. *CSX Transportation, Inc., v. Marquar*, No. 91-5689 (6th Cir. Nov. 13, 1992) (hereinafter "*Marquar*").[1]

The members of AAR and AIRCON administer thousands of collective bargaining agreements with their various unions. The parties to these agreements are continually

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[1] *Amicus curiae* understand that the petitioner submitted copies of the *Marquar* decision to the Court.

involved in minor disputes over their application. In the past, railroads and airlines have relied principally upon injunctive relief to stop threatened or actual strikes over minor disputes. *Amicus curiae*, however, are very concerned that *BN* will lead to more threatened and actual strikes over minor disputes. While a carrier can seek injunctive relief, as a practical matter it may be unable to obtain such relief before its operations have been disrupted, particularly when a union strikes with little or no prior notice. That was the situation both in *BN* and *Marquar*. In each case, serious service disruptions resulted, even though the carriers moved promptly to obtain restraining orders. Indeed, the involved union appeared to pursue a calculated strategy of timing its pre-dawn strikes to ensure that the carrier could not get into court before suffering disruption to operations, knowing all the time that the dispute was a classic minor dispute and that its strikes would eventually be enjoined. An interruption of a carrier's operation, even for a few hours, can have a serious economic impact upon that carrier, as well as the shipping and travelling public. In addition, even a strike of short duration can cause shippers or travellers to switch their business from the threatened carrier to other carriers, thereby causing economic injury to the targeted carrier.

While carriers in the past usually pursued only one of the traditional judicial remedies available for such unlawful strikes, that is no longer feasible. There are significant new competitive pressures upon railroads and airlines brought about by deregulation of these industries. Congress completely removed economic regulation from airlines in the Airline Deregulation Act of 1978 and significantly deregulated railroads in the Staggers Rail Act of 1980. For example, prior to deregulation, price competition in the railroad and airline industries was severely restricted by comprehensive federal regulation. Unions benefited directly from the lack of competition. Pay and benefits were not generally a source of competition among carriers. The railroads typically reached national wage settlements. Air carriers usually bargained on a

pattern basis. Often, wage settlements would be followed by carrier applications to the relevant regulatory agency to raise prices to reflect higher labor costs.[2]

Since deregulation, carriers can no longer automatically pass increased labor costs on to consumers for their services. Price and service levels are now determined primarily by market forces. Competition has put new pressures upon the labor cost structures of airlines and railroads that developed during the regulated era. Therefore, in the deregulated era, there is more chance for disagreement between labor and management. Rail and airline unions are by definition cartels, and are among the most powerful unions in the most unionized sector of the economy.[3] Given the new competitive pressures, carriers are less able to bear financial losses from strikes or strike threats. Now, more than ever, it is important that interpretive disputes be channelled into the RLA's mandatory minor dispute resolution mechanisms.

Injunctive relief is simply not an adequate deterrent to an illegal strike. Even though the union knows it will be judicially restrained, it also realizes that it can inflict serious economic injury on a carrier with impunity, even for a brief service disruption. The availability of damages or make whole remedy is necessary to ensure that the statutory minor dispute procedures are observed and to compensate carriers for injury from an unlawful strike.

The AAR and AIRCON are also concerned that *BN* overturns the fundamental principle that the RLA imposes reciprocal duties and obligations upon unions and carriers.

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[2]In the railroad industry, this is the Interstate Commerce Commission. In the airline industry, the relevant agency was the Civil Aeronautics Board.

[3]*See generally, e.g.*, R. Posner, *Some Economics of Labor Law*, 51 U. of Chicago L. Rev. 988 (1984).

There is no principled basis to hold that only injunctive relief is available to carriers under the RLA when employees or their representatives breach those duties, while employees and their representatives also have available a broad array of compensatory remedies, including damages, make whole remedies, and monetary awards by arbitrators, when a carrier is found to have violated its statutory obligations.

II. SUMMARY OF ARGUMENT

The Fifth Circuit's decision in *BN* requires Supreme Court review, because that decision disregarded the traditional principle as set forth in long-standing precedents of this Court and recently restated in *Franklin v. Gwinnett County Public Schools*, ___ U.S. ___, 112 S. Ct. 1028, 1035 (1992)(hereinafter "*Franklin*"), that a person injured by the violation of a federal statute should be able to recover damages or other monetary relief. Although the Fifth Circuit agreed that a carrier has an implied cause of action under the RLA based on a strike over a minor dispute, it nonetheless refused to follow *Franklin*. Instead of the "common-law tradition [which] regarded the denial of a remedy as the exception rather than the rule," 112 S.Ct. at 1036, the Fifth Circuit announced a rule of law that monetary remedies are never available for a strike which violates the RLA minor disputes procedures.

The Fifth Circuit's decision also conflicts with decisions of this Court upholding broad authority in the lower courts to apply traditional judicial remedies for breaches of RLA statutory duties. In addition, the *BN* decision is contrary to the RLA, its history, and purpose. Absent Supreme Court review, *BN* will undermine the effectiveness of the RLA minor dispute procedures, which, as this Court has repeatedly recognized, are fundamental to the RLA's central purpose of avoiding interruptions to rail and air carrier operations. Moreover, the issue of whether the traditional rule reaffirmed in *Franklin* applies to the RLA is important to the effective working of a

statute designed to protect the interests, not only of carriers, unions, and employees, but also the public interest, which is adversely impacted by strikes over labor disputes in these vital industries.

For these reasons, the AAR and AIRCON respectfully urge the Court to review the issue whether carriers can recover compensatory or make whole remedies for strikes over minor disputes.

III. ARGUMENT

A. *BN* Is Contrary To *Franklin* And Other Precedents Of This Court

The *BN* decision is clearly contrary to this Court's analysis and holding in *Franklin*. In addition, the *BN* decision is contrary to the several decisions of this Court that traditional judicial remedies are available for breaches of RLA duties.

In *Franklin*, the Court observed that "the question of what remedies are available under a statute that provides a private right of action is 'analytically distinct' from the issue of whether such a right exists in the first place." 112 S. Ct. at 1032. Once it is established that there is an implied cause of action under a federal statute, this Court restated the "long-standing rule" that "we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." *Id.* at 1033. *See also id.* at 1035. The *BN* decision involved the same kind of issue present in *Franklin* -- what are the appropriate remedies for a cause of action implied under a federal statute? There is no question, as *BN* agreed, that carriers have a cause of action implied under the RLA that strikes over minor disputes are prohibited. *See, e.g., Conrail*, 491 U.S. at 229; *Chicago River*, 353 U.S. at 30. Yet, the Fifth Circuit refused to follow *Franklin* and ignored the "general rule" reaffirmed there. Instead, *BN* merely reaffirmed its 1958

holding in *Brown* that "[w]e do not think that Congress here intended or did create a new statutory right of action for damages . . . ." 252 F.2d at 155. The Fifth Circuit improperly put the burden on the carrier to show that Congress had affirmatively authorized a damages remedy in the RLA. The Fifth Circuit thus made the same basic mistake as the lower court in *Franklin* of confusing the "analytically distinct" issue of whether there was an implied cause of action with the issue of the appropriate remedy. The Fifth Circuit's analytical approach was, of course, the very same approach soundly disapproved in *Franklin*.

The Fifth Circuit attempted to avoid *Franklin* by limiting it to the particular statute involved there, Title IX of the Education Amendments of 1972. 961 F.2d at 89 n.9. This Court made abundantly clear in *Franklin*, however, that the general rule was not limited to Title IX cases. Part II of the Court's opinion traced the general rule from its common law origins through early precedents of this Court, including *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). These precedents involved not only civil rights cases, but the very first decision by this Court to hold that the RLA was enforceable through judicial remedies. 112 S. Ct. at 1033, *citing Texas & New Orleans R.R. Co. v. Railway & Steamship Clerks*, 281 U.S. 548, 569 (1930).[4] In Part III of its opinion, the Court stated that "[w]e now address whether Congress intended to limit application of this general principle in the enforcement of Title IX," and went on to apply the general rule to the case before it.

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[4]Other referenced decisions included federal causes of actions implied under railroad safety laws, *Texas & Pacific Ry. Co. v. Rigsby*, 241 U.S. 33 (1916), and the securities law, *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964).

112 S. Ct. at 1035. There was simply no principled way for *BN* to disregard *Franklin*.[5]

The *BN* decision is also contrary to other decisions of this Court, which, consistent with the traditional common law principles reaffirmed in *Franklin*, have held that courts have available all traditional remedies to enforce RLA requirements. In *Texas & New Orleans R.R. Co. v. Bhd. of Ry. & Steamship Clerks*, 281 U.S. 548, 569 (1930), the Court early on held that the RLA was enforceable through judicial remedies, even though none were specified in the statute. *See id.* at 569-70 ("The right is created and the remedy exists," citing *Marbury v. Madison*). In *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 207 (1944), the Court upheld the availability of a damages remedy against a union which violated its statutory duty of fair representation, stating that "the [RLA] contemplates resort to the usual judicial remedies of injunction and award of damages when appropriate . . . " In *Chicago & North Western Ry. v. United Transportation Union*, 402 U.S. 570, 577 (1971), the Court held that Section 2, First of the RLA was "enforceable by whatever means might be developed on a case-by-case basis." The Court quoted congressional testimony by counsel for rail unions that this was to be done "through the courts in the way in which the common law has developed in England and America." *Id.* at 577. And, *Franklin* itself held that damages were a traditional and appropriate remedy for a statutory violation under the common law. 112 S. Ct. at 1033-36.

The only decision to find any limit on appropriate judicial remedies under the RLA was *Int'l Bhd. of Electrical*

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[5]Although the majority opinion in *Marquar* did not really apply *Franklin*, even it agreed that *Franklin* controlled the issue of whether damages were available against a union for a strike over a minor dispute. The majority stated that "[s]ince the RLA contains an implied right of action, *Franklin* directs us to presume that this right can be enforced by damages in appropriate cases unless Congress has clearly spoken to the contrary." Slip op. at 41.

Workers v. Foust, 442 U.S. 42 (1979) (hereinafter "*Foust*"). While the Court found that punitive damages are not available against a union that violated its duty of fair representation, the Court reaffirmed that damages or a make whole remedy was appropriate to compensate the injured party and secure compliance with the RLA. This same reasoning equally supports a monetary remedy for a carrier injured by a union's violation of the RLA. *Cf. Int'l Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 690 (1963) ("We have held other duties imposed upon the carriers and their employees by the [RLA] binding and their breach redressable in the courts . . . .").

There is no suggestion in any decision of this Court that a damages or make whole remedy should never be available for breach of one of the most fundamental duties imposed by the RLA -- a union's duty not to strike over a minor dispute. There is also no suggestion in any decision of this Court that only employees, and not carriers, are to be compensated for breaches of statutory duties, which are binding on both parties. Thus, *BN* is clearly contrary to controlling precedents of this Court.

B. *BN* Is Contrary To The Legislative History, Purpose And Structure Of The RLA

The *BN* decision also ignored and is contrary to the legislative history, purpose and structure of the RLA. As this Court held in *Franklin*, the traditional judicial remedies are presumed available, unless Congress expressly restricted their availability. Not only does the RLA not contain any such limitation, Congress clearly intended that all traditional judicial remedies be available for breach of RLA duties.

As this Court has observed, the RLA is unique in that it was, in large part, agreed to by labor and management and then enacted by Congress. *See, e.g., Burlington Northern R.R. Co. v. Bhd. of Maintenance of Way Employes*, 481 U.S. 429, 444 (1987) (hereinafter "*BN v. BMWE*"); *Chicago & North Western*

Ry. v. United Transportation Union, 402 U.S. 570, 576 (1971). As the Act's legislative history shows, the parties deliberately did not specify all duties or remedies under the RLA. Instead, they left to the courts the task of defining those duties on a case-by-case basis. *See generally, e.g., Chicago & N.W. Ry.*, 402 U.S. at 577; *Marquar*, slip op. at 12-17. Once a statutory duty was established, it was clear that Congress intended that courts follow the traditional presumption described in *Franklin* that all appropriate remedies, both at law and equity, were available to redress a breach of that duty. The Fifth Circuit simply ignored this legislative history in *BN*, as it had more than 30 years earlier in *Brown*.

In addition, the Fifth Circuit's reasoning that compensatory remedies are never appropriate in the case of a strike in violation of the RLA's minor dispute procedures, but are available for a carrier's breach of the RLA's major dispute procedures, is not supported by the RLA. A major dispute is a disagreement arising from attempts to amend collective agreements. *See, e.g., Conrail*, 491 U.S. at 302. The Fifth Circuit attempted this forced distinction, because, in *United Industrial Workers v. Board of Trustees*, 400 F.2d 320 (5th Cir. 1968), *cert. denied*, 395 U.S. 905 (1969), (hereinafter "*Galveston Wharves*"), it previously held that a make whole remedy was available to redress breach of the RLA major dispute procedures, even though the RLA did not expressly authorize such a remedy. As this Court's precedents show, however, the RLA's minor dispute procedures are as critical to achieving the RLA's central purpose of avoiding interruptions to carrier operations as are its major dispute procedures. *See, e.g., Conrail*, 491 U.S. at 299; *Bhd. of Locomotive Engineers v. Louisville & Nashville R.R.*, 373 U.S. 33 (1963). Indeed, while the major dispute procedures postpone the day a union can lawfully strike, the minor dispute procedures absolutely forbid strikes.

Similarly, there is no basis in the RLA, its history or purpose, for the Fifth Circuit to conclude that a union should be able to obtain compensation for its members for a carrier's violation of a RLA statutory duty, but carriers are not to be compensated for a union's violation of its reciprocal statutory duty. By imposing reciprocal duties on carriers and unions, and by not limiting the remedies available for either party's breach of those duties, the RLA intends that monetary remedies be available, not only to employees, but also to carriers injured by a statutory breach. Certainly, nothing in the RLA restricts the availability of monetary remedies to unions and the employees they represent.

C. Supreme Court Review Is Necessary To Give Guidance To Lower Courts

Supreme Court review is also necessary to provide guidance to the lower courts on the important issue of the availability of damages or other compensatory relief for violations of the RLA.

Prior to *BN* and *Marquar*, other than *Brown*, virtually every decision concluded that all traditional judicial remedies were available to redress violations of the RLA. As previously explained *supra* at III. A. B., the decisions of this Court consistently upheld broad judicial authority to fashion compensatory remedies for violation of RLA duties.

The lower courts similarly followed the "traditional presumption" stated in *Franklin*, although not always with express acknowledgement. For example, in *Brady v. Trans World Airlines, Inc.*, 223 F. Supp. 361, 370 (D. Del. 1963), *aff'd*, 401 F.2d 87 (3d Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969), the Court upheld a damage remedy against a union which caused the discharge of an employee in violation of Section 2, Eleventh of the RLA, 45 U.S.C. § 152, Eleventh. Courts have also held that damages are available against carriers for

interfering with employees' rights to organize in violation of Section 2, Third and Section 2, Fourth of the RLA, 45 U.S.C. §§ 152, Third and Fourth.[6] The District Courts are split whether punitive damages against carriers are appropriate for such a statutory violation.[7] As discussed, in *Galveston Wharves*, the Fifth Circuit held that a union could obtain a make whole remedy on behalf of its members against a carrier which violated the status quo requirement in Section 6 of the RLA, 45 U.S.C. § 156. In *United Transportation Union v. Florida East Coast Ry.*, 586 F.2d 520 (5th Cir. 1978), the Fifth Circuit suggested that compensatory damages may be available for a status quo violation. A district court held in *Denver & R.G.W. R.R. v. Bhd. of R.R. Trainmen*, 58 L.R.R.M. (BNA) 2568 (D. Colo. 1965), *rev'd on other grounds*, 367 F.2d 137 (10th Cir. 1966), *rev'd*, 387 U.S. 556 (1967), that damages were available against a union for an unlawful strike over a minor dispute.[8]

The *Brown* decision, as reaffirmed by *BN*, is a dramatic departure from the development of remedies under the RLA up to this point and has gotten the lower courts off track on available remedies. The *Brown* decision clearly influenced the majority in *Marquar*, which elevated *Brown*, as reaffirmed by *BN*, as the definitive authority on what common law remedies are available for a strike over a minor dispute. *See, e.g., Marquar*, slip op. at 44-45. Even though the majority opinion purported

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[6]*See, e.g., Burke v. Compania Mexicana de Aviacion, S.A.*, 433 F.2d 1031, 1033-34 (9th Cir. 1970).

[7]*Compare, e.g., Belton v. Air Atlanta, Inc.*, 647 F. Supp. 28, 31-32 (N.D. Ga. 1986); *Brown v. World Airways, Inc.*, 539 F. Supp. 179, 181 (S.D.N.Y. 1982), which held punitive damages were available, with *Maas v. Frontier Airlines, Inc.*, 676 F. Supp. 224 (D. Colo. 1987); *Brotherhood of Ry. Carmen v. Delpro Co.*, 579 F. Supp. 1332, 1335-36 (D. Del. 1984), which held they were not.

[8]Although not involving a minor dispute, *National Airlines, Inc., v. Airline Pilots Ass'n*, 431 F. Supp. 53 (S.D. Fla. 1976), relied on *Brown* to hold that damages were unavailable for breach of the duty to bargain in good faith.

to apply *Franklin*, its per se rule that damages are never available to a carrier for such a violation was clearly contrary to *Franklin* and the RLA, which contain no such limitation on remedies.

Like *BN*, the *Marquar* majority transgressed *Franklin* by putting the burden on the carrier to show that the RLA affirmatively authorized a damages remedy. For example, the majority reasoned that, because no "published opinion" had held a carrier could obtain damages against a union, "a party requesting such a change should be required to demonstrate why the remedies that have been appropriate for 66 years are no longer good enough." *Id.* at 45-46. However, as *Franklin* demonstrated, the presumption is that a damages remedy is available unless Congress has affirmatively limited its availability. The relevant inquiry is not whether the parties have sought a particular remedy in the past or even whether another court has authorized that remedy under the statute. The correct inquiry is whether Congress has precluded that remedy. In *Marquar*, the majority fully agreed with the dissent that the RLA contained no limitation on remedies under the RLA. *Id.* at 41. Moreover, the only RLA "common law" cited by the majority opinion for its conclusion that a carrier may never recover damages from a union for a strike over a minor dispute was *Brown*. *Id.* at 46. But *Brown* is demonstrably contrary to *Franklin*!

The majority defended its construction of *Franklin* by stating that *Franklin* allows a court to determine whether a remedy is "appropriate." *Id.* at 42. However, this Court, by use of the word "appropriate," merely referred to the traditional remedies for an injury and held that damages were an appropriate remedy for the implied cause of action involved there. The Court relied upon the traditional presumption that where the statutory violation "results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is

implied, according to a doctrine of the common law . . . ." 112 S. Ct. at 1033, quoting *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33, 39 (1916). This Court surely did not intend, through use of the single word "appropriate," that a court could impose its own judicial philosophies regarding which classes of persons should receive monetary compensation for statutory injuries, labor relations policies, and the "balance of power" between labor and management under the RLA, and proceed to create wholesale limitations not found in the statute on available remedies. Such considerations are the province of the legislature. Yet, that is exactly what the Sixth and Fifth Circuits have done, by holding carriers can never recover damages from unions for minor dispute strikes.

Furthermore, Congress already determined the "balance between labor and management" in minor disputes by providing in the RLA that unions cannot settle minor disputes through the exercise of their economic power, as they tried here. *See, e.g., Bhd. of Locomotive Engineers v. Louisville & Nashville R.R.*, 373 U.S. 33, 40 (1963) (Congress did not intend "to permit the settlement of minor disputes through the interplay of economic force . . ."); *Chicago River*, 353 U.S. at 34. Instead of economic warfare, Congress required that minor disputes be resolved by a neutral arbitrator. For these same reasons, the *Marquar* majority's worry that a damages remedy could be used as a club by management against unions is totally misplaced.

The Sixth Circuit's concern that, if a union "guessed wrong" whether a dispute was major or minor, it would be liable for damages that could impair its effectiveness as a union is also totally contrary to the RLA minor dispute procedures and this Court's precedents holding those procedures mandatory. Unions have no protected right to "guess" whether a dispute is minor. The minor dispute procedures are not optional. Moreover, as this Court explained in *Conrail*, when there is doubt whether a dispute is major or minor, the Act prefers a minor dispute classification in order to channel the dispute into

a peaceful dispute resolution mechanism. 491 U.S. at 310-11. ("Full utilization of the [Adjustment] Board's procedures will ensure that the risks of self-help are not needlessly undertaken and will aid '[t]he peaceable settlement of labor controversies'.").

A union's natural proclivity will be to "guess" that a dispute is major, so the union can use its considerable coercive economic weapons, *i.e.*, strikes, to settle the dispute. The availability of a damages remedy will help deter unions from "guessing" whether a dispute is major or minor and ensure that "the risks of self-help are not needlessly undertaken." Furthermore, the unions have a full remedy in arbitration. Or, if they believe that the carrier has unilaterally changed a collective agreement, so as to give rise to a major rather than a minor dispute, they can seek judicial relief, as they frequently do, including in *Conrail*. Conversely, by shielding a union from the economic consequences of a "bad guess," the lower courts' decisions will encourage strikes over minor disputes. The lower courts' analysis here also ignores the public interest in avoiding interruptions to the operations of rail and air carriers from labor disputes. *See, e.g., Brotherhood of Locomotive Engineers v. Baltimore & Ohio R.R.*, 372 U.S. 284, 290 (1963) ("[t]he federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce."); *accord Virginian Railway v. System Federation No. 40*, 300 U.S. 515, 552 (1937).

The *Marquar* majority's reliance upon this Court's decisions in *Foust* and *BN v. BMWE* was also misplaced. As previously explained, *Foust* only held that punitive damages are unavailable; it actually supports the position that compensatory damages are available to carriers when a union engages in an illegal strike. In *BN v. BMWE*, the Court was concerned with what restrictions the RLA imposed upon unions after the RLA's major dispute resolution procedures had been exhausted and the parties were free to engage in self-help. The Court was being asked to find an implied cause of action against secondary

picketing in that situation. In contrast, there is no question that a strike over a minor dispute gives rise to a cause of action under the RLA. The only question here is the appropriate remedy, an issue not present in *BN v. BMWE*. Furthermore, in *BN v. BMWE*, this Court refused to find a limitation (against secondary picketing) not contained in the RLA. Yet that was precisely what the Fifth, and now the Sixth, Circuits have done -- created a limitation (against compensatory remedies) Congress has never adopted.

Finally, both *BN* and the majority in *Marquar* made too much of the fact that the issue of a carrier recovering damages from a union has arisen "after 66 years." *Marquar*, slip op. at 46. The case law under the RLA has historically developed as the parties brought issues to the courts. The damages issue, as well as other important issues of first impression under the RLA, has arisen now, "after 66 years," in large part due to pressures resulting from deregulation. For example, the issue of management's prerogative to sell all of its rail lines did not come to the Court until *Pittsburgh & Lake Erie Railroad v. Railway Labor Executives Association*, 491 U.S. 490 (1989), 63 years after enactment of the RLA. This Court there noted that line sales were encouraged by Congress' partial deregulation of railroads. *Id.* at 510-11. This Court did not address whether secondary picketing violated the RLA until 1987 in *BN v. BMWE*. In that case, the carrier target of the secondary picketing had broken from the national pattern of railroad labor agreements, because of competitive forces brought on, in part, by deregulation. Even though the major rail carriers had historically bargained as a national group for more than 40 years, the courts also had no problem ruling that a carrier could withdraw from that type of bargaining. *See, e.g., United Transportation Union v. Grand Trunk Western R.R.*, 901 F.2d 489 (6th Cir.), *cert. denied*, 111 S. Ct. 55 (1990). Again, carriers withdrawing from national multi-employer bargaining did so because of competitive pressures brought on by deregulation. This Court did not address until 1989 the issue whether a carrier violated the RLA by refusing

to displace junior employees who crossed a picket line with more senior, full-term strikers who sought to return to work at the strike's conclusion. *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. 426 (1989). Before airline deregulation, airlines typically did not try to operate during a strike, and issues regarding replacement workers and cross-overs, therefore, did not arise.[9] In each of these cases, the passage of time did not foreclose judicial treatment of these issues or dictate their outcome. Nor should it have been a factor in *BN* or *Marquar*.

IV. CONCLUSION

Given the importance of the issue of whether damages or other compensatory remedies are available to carriers when a union strikes over a minor dispute to the railroad and airline industries and to the proper administration of the RLA, the Court should hear the issue now.

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[9]The Airline Deregulation Act did away with the mutual aid pact, under which flying airlines shared revenues with struck carriers.

(5)

No. 92-606

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In The

Supreme Court of the United States

October Term, 1992

BURLINGTON NORTHERN RAILROAD COMPANY,

Petitioner,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, an unincorporated association, BEN OCHOA, GENERAL CHAIRMAN, E.R. SPEARS, GENERAL CHAIRMAN, PAUL S. SWANSON, GENERAL CHAIRMAN, and BRUCE G. GLOVER, GENERAL CHAIRMAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

CONGRESS DECIDED IN 1926 THAT ALL REMEDIES ARE AVAILABLE AND THERE IS NO SHOWING BY BMWE THAT CONGRESS HAS SINCE THAT TIME EXPRESSLY STATED OTHERWISE 2

THE UNION'S ALLEGED RIGHT TO "GUESS WRONG" LACKS ANY BASIS IN THE RLA OR THIS COURT'S DECISIONS 4

RECENT CASES RELIED ON BY BMWE ACTUALLY SUPPORT THE PROPOSITION THAT FEDERAL COURTS HAVE BROAD REMEDIAL POWERS UNDER THE RLA 7

THE COMMON LAW OF THE RLA DOES NOT SUPPORT *BURLINGTON NORTHERN'S* ABSOLUTE RULE 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Association of Flight Attendants v. Horizon Air Industries, Inc., 976 F.2d 541 (9th Cir. 1992).....7, 8

Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad, 353 U.S. 30 (1957).....4, 5

Burlington Northern Railroad Company v. Brotherhood of Maintenance of Way Employes, 961 F.2d 86 (5th Cir. 1992)..... *passim*

CSX Transportation, Inc. v. Marquar, No. 91-5689, 1992 U.S. App. LEXIS 29800 (6th Cir. November 13, 1992)..... *passim*

Chicago & North Western Railway v. United Transportation Union, 402 U.S. 570 (1971).....3, 7

Consolidated Rail Corp. v. Railway Labor Executives' Association, 491 U.S. 299 (1989)..... 5

Detroit & Toledo Shore Line Railroad v. United Transportation Union, 396 U.S. 142 (1969)..... 5

Franklin v. Gwinnett County Public Schools, ___ U.S. ___, 112 S. Ct. 1028 (1992).....2, 3

Louisville & Nashville Railroad Company v. Brown, 252 F.2d 149 (5th Cir.), *cert. denied*, 356 U.S. 949 (1958)..... 7

United Industrial Workers of the Seafarers International Union v. Board of Trustees of Galveston Wharves, 400 F.2d 320 (5th Cir. 1968), *cert. denied*, 395 U.S. 905 (1969).....8, 9

United Transportation Union v. Florida East Coast Railway, 586 F.2d 520 (5th Cir. 1978)..... 9

TABLE OF AUTHORITIES

Page

STATUTES

45 U.S.C. § 152 First 7

45 U.S.C. § 153 First 5

45 U.S.C. § 156 9

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF OF PETITIONER

Petitioner, Burlington Northern Railroad Company ("BN"), replies to the brief in opposition to BN's Petition for Writ of Certiorari filed by respondent, Brotherhood of Maintenance of Way Employes ("BMWE"). That brief advanced the proposition that a monetary recovery is never available when a union violates the RLA by striking over a minor dispute. However, Congress intended the courts to have broad remedial powers, including monetary relief, to remedy violations of the RLA. The Fifth Circuit's flat rule of law that a monetary remedy is **never** available for a violation of a union's duty not to

strike over minor disputes directly conflicts with the RLA and this Court's decisions. BN's Petition presents a crisp issue of law that the lower courts have had difficulty resolving.[1] To settle this continuing controversy, BN respectfully requests this Court to grant its Petition for Writ of Certiorari and review the judgment and opinion of the *Burlington Northern Railroad v. Brotherhood of Maintenance of Way Employes*, 961 F.2d 86 (5th Cir. 1992) ("*Burlington Northern*").

CONGRESS DECIDED IN 1926 THAT ALL REMEDIES ARE AVAILABLE AND THERE IS NO SHOWING BY BMWE THAT CONGRESS HAS SINCE THAT TIME EXPRESSLY STATED OTHERWISE

BMWE argues that it should be for Congress rather than the courts to determine if a carrier may be awarded remedial damages for a union's violation of its duty not to strike over minor disputes. Opposition Brief at 20-23. Essentially, the union argues because no court has ever found damages to be an appropriate remedy for a union's illegal strike over a minor dispute, that such a remedy will *never* be appropriate unless an act of Congress specifically allows for such a remedy.[2]

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[1] The Sixth Circuit is one of those courts. Its most recent decision on this issue is *CSX Transportation, Inc. v. Marquar*, No. 91-5689, 1992 U.S. App. LEXIS 29800 (6th Cir. November 13, 1992) ("*Marquar*"). The time for filing a petition for rehearing was December 11, 1992, and CSX Transportation has not filed such petition nor requested an extension of time in which to file such petition after such date.

[2] Although BMWE relies heavily on the *Marquar* decision, the Sixth Circuit court unanimously found that the presumption of all available remedies announced in *Franklin* applies to the RLA, and that Congress has never indicated that any particular remedy was not appropriate to compensate a carrier for an unlawful strike over a minor dispute. (Slip op. at 10; 13a).

These arguments illustrate BMWE's very deep misunderstanding of this Court's *Franklin* decision and the drafters' intent of the RLA. *Franklin v. Gwinnett County Public Schools*, ___ U.S. ___, 112 S. Ct. 1028 (1992). First, BMWE argues that *Franklin* is applicable only to Title IX of the Education Amendments of 1972. The unanimous *Marquar* court found that "*Franklin* . . . set out general principles governing the availability of particular remedies under any federal statute." (Slip op. at 10; 8a and n.4); *See Franklin*, 112 S. Ct. at 1035.

Second, by leaving out the word "expressly" in *Franklin's* statement that the court presumes a damages remedy "unless Congress has expressly indicated otherwise," (112 S. Ct. at 1036), BMWE argues that Congress has, by its silence, "indicated otherwise." (Opposition Brief at 18). This argument was dismantled by the unanimous portion of the *Marquar* decision, wherein the Sixth Circuit found that Congress never indicated that any particular remedy was not available for violations of the RLA. (Slip op. at 16-26; 12a-21a). Not willing to concede defeat, BMWE goes on to reargue the same points thoroughly refuted in *Marquar. Compare* Opposition Brief at 18-19 with *Marquar*, Slip op. at 16-26; 12a-21a.

Thus, BMWE's argument completely contradicts this Court's decisions in *Chicago & North Western Railway v. United Transportation Union*, 402 U.S. 570 (1971) and *Franklin*, and is at odds with the RLA drafters' intent. Congress left it to the courts to determine the appropriate remedies for violations of the RLA. The Fifth Circuit's failure to acknowledge that fundamental premise in the RLA, that Congress gave the courts **broad remedial powers** makes this Court's review necessary.

References to "___a" are to the Appendix in BN's Supplemental Brief filed December 7, 1992.

THE UNION'S ALLEGED RIGHT TO "GUESS WRONG" LACKS ANY BASIS IN THE RLA OR THIS COURT'S DECISIONS.

One of the most striking new arguments in the opposition brief is BMWE's reassertion of a long discredited position: the union, at its whim, may choose whether or not to use the arbitration procedures Congress made compulsory under the RLA. (Opposition Brief at 29-30). This position is proffered by BMWE as its "reasonable belief" theory which is similar to the *Marquar* court's view that the unions have a right to "guess wrong." *Marquar,* Slip op. at 78; 57a. However, the burden is on the unions to engage in arbitration or go to court for a determination of their "reasonable belief."

The BMWE argues that if *Burlington Northern* is reversed, there will be a "chilling effect" on the union's "right to strike" whenever it has a "reasonable belief" that a dispute may not be a minor dispute. *Burlington Northern* is not about the "right to strike" or a union's "reasonable belief" or "guessing wrong." The strike by BMWE was unlawful. 961 F.2d at 88 and n.6. The dispute was determined to be a minor dispute. 961 F.2d at 87. What is at issue here is *Burlington Northern's* holding that monetary relief is **never** available to remedy an illegal strike over a minor dispute.

This right to "guess wrong" or "reasonable belief" theory is a variant of the position taken by unions more than thirty-five years ago in *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad,* 353 U.S. 30, 37 (1957). There, the unions argued that they were free to decide whether or not to use the peaceful, but compulsory, arbitral mechanisms of the RLA. In keeping reciprocal the duties of peacefully resolving minor disputes, this Court stated that both unions and carriers are required to proceed to arbitration to resolve their minor disputes, and that the unions had conceded their right to strike over such disputes. 353 U.S. at 37-39.

As this Court has recently reaffirmed, the unions have no right to strike over minor disputes. *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 304 (1989) ("*Conrail*"). Any legal basis for BMWE to assert that it can either "guess wrong" or have a "reasonable belief" that allows it to strike in a minor dispute, disappeared more than thirty-five years ago in *Chicago River*. *See Marquar*, Slip op. at 43; 34a.

The only support advanced by BMWE for its new argument is this Court's decision in *Detroit & Toledo Shore Line Railroad v. United Transportation Union*, 396 U.S. 142, 154-55 (1969) ("*Shore Line*") (Opposition Brief at 2 n.2). However, neither the *Shore Line* decision nor any other decision of this Court stands for the proposition that a union may initially avoid the dispute resolution mechanism set forth in Section 3 First of the RLA, 45 U.S.C. § 153 First, and conduct a disruptive strike instead of pursuing relief in a judicial or arbitral forum.[3]

In addition to its flawed policy arguments, BMWE attempts to use its counter-statement of the facts to support its variation of this previously rejected position. These counter-statement facts actually refute most of BMWE's argument.[4] BMWE argues that because it was

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[3] Indeed, in *Conrail*, this Court cited *Shore Line* for the proposition that an injunction, rather than a strike, is the proper remedy available to a union for a carrier's violation of the *status quo*. *Conrail*, 491 U.S. at 304.

[4] BMWE makes much ado about the facts set forth in BN's Petition. Those facts, which are two pages and two footnotes in length, appear either in the Fifth Circuit's decision or in the record in the court below. Though BMWE asserts that there were misstatements or factual assertions beyond the record made by BN, it never pointed out any such misstatements or factual assertions. Apparently, BMWE created this pretext to advance facts to support its main opposition argument that here BMWE had a "reasonable belief" that there was a major dispute and, as such, it had the "right to strike" instead of pursuing relief in

without a "court at its elbow," it had little or no time in which to evaluate whether the dispute was major or minor. (Opposition Brief at 29). BMWE's own facts belie this argument. There was obviously ample time and opportunity for BMWE to go to court to obtain a declaration of the nature of the dispute since the dispute ran from March 1990 until June 26, 1990, when BMWE struck BN. Indeed, BMWE states that it took more than a month to obtain strike authorization. (*See* Opposition Brief at 8-9). However, BMWE provides no explanation whatsoever for its failure to pursue the two peaceful options – arbitration or court. Instead, BMWE asserts only that it "believed the only recourse available to it . . . was to engage in self-help." (Opposition Brief at 8). The effect of BMWE's refusal to pursue judicial relief was to shift the burden of going to court, on short notice, in the middle of the night, to BN. Thus, carriers and the public suffer severe damage when it would have been appropriate for the union to seek declaratory relief prior to initiating its strike.

As BN pointed out in its petition, in the absence of review by this Court, the absolute rule announced by the Fifth Circuit, which prohibits a carrier from ever obtaining monetary relief for illegal strikes, will continue to have an adverse effect on the peaceful and prompt resolution of minor disputes under the RLA. (BN Petition at 26). The rule announced in *Burlington Northern* as interpreted by BMWE and construed by the majority in *Marquar* does not encourage unions to resolve their disputes through the congressionally mandated arbitration procedures or seek judicial declarations, but instead encourages economic disruption and transportation chaos. The

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judicial or arbitral forums. As stated here at p. 4, the Fifth Circuit never determined whether BMWE had a "reasonable belief" but bluntly held that monetary relief is never available for an illegal strike over a minor dispute.

immediate need to review this decision is supported by BMWE's interpretation of *Burlington Northern* that unions can obtain one "free interruption" of commerce in a minor dispute, and not pursue the peaceful, yet compulsory, arbitral mechanisms of the RLA. Without review by this Court, there is no incentive for the unions to first resolve their disputes through arbitration or seek judicial relief, and there will be little deterrence for unions to refrain from striking over minor disputes.

RECENT CASES RELIED ON BY BMWE ACTUALLY SUPPORT THE PROPOSITION THAT FEDERAL COURTS HAVE BROAD REMEDIAL POWERS UNDER THE RLA

BMWE states that other courts are denying damage remedies under reasoning similar to *Brown*,[5] *Burlington Northern*, and *Marquar*, Opposition Brief at 11 n.13, 14, citing specifically, *Association of Flight Attendants v. Horizon Air Industries, Inc.*, 976 F.2d 541 (9th Cir. 1992). In that case, the union sued Horizon Air under Section 152 First of the RLA, 45 U.S.C. § 152 First, for violating the duty to exert reasonable efforts to make an agreement. 976 F.2d at 543. Though the Ninth Circuit affirmed the trial court's finding that Horizon Air violated § 152 First, the court reversed the trial court's award of attorney's fees. The court held that attorney's fees were not available under the bad faith exception to the American rule when the finding of bad faith is an element of the cause of action. 976 F.2d at 550.

The other basis argued by the union for an award of fees was the district court's power "to remedy violations of the RLA 'by whatever appropriate means might be developed on a case-by-case basis.' *Chicago & North*

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[5] *Louisville & Nashville Railroad Company v. Brown*, 252 F.2d 149 (5th Cir.), *cert. denied*, 356 U.S. 949 (1958).

Western Ry., 402 U.S. at 577, 91 S. Ct. at 1735." 976 F.2d at 551. However, as the Ninth Circuit stated:

> We find no evidence that Congress intended "such a radical departure from the long-established American rule" when it gave the district courts **broad remedial powers** under the RLA. (citation omitted) (emphasis added).

976 F.2d at 551. There, because the award of attorney's fees would "not [be] remedial [but] . . . punitive," the court refused to allow those fees. 976 F.2d at 551. Quite clearly, the Ninth Circuit's decision does not, by analogy or otherwise, support BMWE's position here. On the contrary, the Ninth Circuit's recognition that Congress gave the courts **broad remedial powers** under the RLA supports BN's position that a monetary remedy is available to a carrier when unions engage in unlawful strikes.

Further, *Horizon Air* shows the continuing controversy over whether or not all remedies are available for violations of the RLA. The Ninth, Sixth, and Fifth Circuits' recent decisions concerning this issue demonstrate the need for this Court's immediate attention to give guidance to the lower courts, the rail and airline industries, and the unions.

THE COMMON LAW OF THE RLA DOES NOT SUPPORT *BURLINGTON NORTHERN'S* ABSOLUTE RULE

BMWE attempts to portray the common law of the RLA as having no published cases awarding damages to a union or to a carrier for violations of the RLA. Even though the dissent in *Marquar* collects the cases which establish a contrary common law (Slip op. at 28-30; 34a-36a), BMWE seeks support in the Fifth Circuit's decision in *United Indus. Workers of the Seafarers Int'l Union v. Board of Trustees of Galveston Wharves*, 400 F.2d 320 (5th Cir. 1968), *cert. denied*, 395 U.S. 905 (1969) (*"Galveston Wharves"*). (Opposition Brief at 27 n.27). Not only does *Galveston Wharves* refute BMWE's view of the common

law, but it also establishes BN's asymmetry argument. BN's Petition at 23-25.

In *Galveston Wharves*, the union sought damages for the railroad's violation of section 156 (45 U.S.C. § 156) and the Fifth Circuit allowed such damages. The measure for computing damages was the lost pay of the members of the union employed by the railroad during the dispute. Realizing that *Galveston Wharves* does not fully support its position, BMWE argues that the union received an equitable remedy of back pay.[6] BN's claim here is for the court to award BN full equitable relief, including a monetary remedy. There is no logical basis to argue under the RLA that unions are entitled to legal damages or equitable monetary remedies, and the carriers are not. In essence, no basis can be found in the RLA or this Court's decisions for a flat rule of law that monetary relief is **never** available for illegal strikes over minor disputes.

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[6] In another case ignored by BMWE, *United Transportation Union v. Florida East Coast Railway*, 586 F.2d 520, 524-25 (5th Cir. 1978), the court characterized the damages awarded in *Galveston Wharves* as "compensatory damages" and then discussed at length the applicable statute of limitations for "claims for money damages under the [RLA]."

CONCLUSION

For the reasons BN sets forth above, this Court should grant BN's Petition for Writ of Certiorari to review the judgment and decision of the Fifth Circuit Court of Appeals.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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9 pp

TABLE OF CONTENTS

Page

I. THE PROPOSED *AMICUS CURIAE* BRIEF MERELY REPEATS THE LEGAL ARGUMENTS OF THE PETITION 2

II. THE PARTIES HAVE ALREADY ADDRESSED ALL MATTERS RELEVANT TO THE CONSIDERATION OF THE PETITION UNDER RULE 10.1 3

III. ALTERNATIVELY, IF LEAVE IS GRANTED FOR THE FILING OF THE *AMICUS CURIAE* BRIEF, THE COURT SHOULD NOTE THAT ITS ARGUMENTS ACTUALLY SUPPORT DENIAL OF *CERTIORARI* 4

CONCLUSION 5

TABLE OF AUTHORITIES

CASES Page

Burlington Northern Railroad Company v. Brotherhood of Maintenance of Way Employes, 961 F.2d 86 (5th Cir.), *reh'g en banc denied*, 968 F.2d 18 (5th Cir. 1992) 3

CSX Transportation, Inc. v. N.J. Marquar, et al., No. 91-5689, slip op., —— F.2d ——, 141 LRRM 2785, 2800-2803 (6th Cir. November 13, 1992) .. 3

Louisville & Nashville Railroad Company v. Brown, 252 F.2d 149 (5th Cir.), *cert. denied*, 356 U.S. 949 (1958) 3

STATUTES

§ 2 Seventh of the Railway Labor Act, 45 U.S.C. § 152 Seventh 4

RULES

Supreme Court Rule 10.1 ..... 3, 4, 5
Supreme Court Rule 37.1 ..... 2, 3
Supreme Court Rule 37.2 ..... 2, 3, 5
Supreme Court Rule 37.4 ..... 1, 2

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Petitioner,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, an unincorporated association, BEN OCHOA, GENERAL CHAIRMAN, E.R. SPEARS, GENERAL CHAIRMAN, PAUL S. SWANSON, GENERAL CHAIRMAN, and BRUCE G. GLOVER, GENERAL CHAIRMAN, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENTS' OBJECTION TO THE FILING OF AMICUS BRIEFS PRIOR TO THE CONSIDERATION OF THE PETITION

Pursuant to Supreme Court Rule 37.4, Respondents Brotherhood of Maintenance of Way Employes, Ben Ochoa, E. R. Spears, Paul S. Swanson, and Bruce G. Glover ("Respondents") object to the filing of the *amicus curiae* brief by the Association of American Railroads ("AAR") and the Airline Industrial Relations Conference ("AIRCON"), and as reason for the withholding of consent, respectfully show as follows:

I. THE PROPOSED *AMICUS CURIAE* BRIEF MERELY REPEATS THE LEGAL ARGUMENTS OF THE PETITION

The proposed amici never directly approached Respondents to obtain our consent; nor were Respondents ever advised what matters were to be addressed in the *amicus curiae* briefs which had not already been presented to the Court by Petitioner.[1] In light of the 1990 revisions to Rules 37.1 and 37.2, Respondents believed that it would be inappropriate to consent to the filing of an *amicus curiae* brief without at least knowing what additional matters were to be addressed which were not already addressed by Petitioner.[2]

However, after now reviewing the legal arguments contained in AAR's and AIRCON's *amicus curiae* brief, it is evident that it presents nothing new and simply repeats the arguments made by Petitioner. The Court has indicated in Rule 37.1 that *amicus curiae* briefs of this nature are a burden on the Court and are not favored. Moreover, AAR and AIRCON's motion for leave to file their brief is further deficient in that it fails to set forth specifically the "facts or questions of law that have not been . . . presented by the parties and their relevancy to the disposition of the case" as required by Rule 37.4. The allegation that AAR and AIRCON represent a number of employers subject to the Railway Labor Act does not address that issue. Therefore, since the proposed *amicus curiae* brief is simply duplicative of the Petition, leave to file it should be denied.

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[1] Consent was sought not by AAR or AIRCON, but by the Petitioner who had apparently arranged for the filing of the proposed *amicus curiae* brief by these non-parties.

[2] Moreover, as no notice was provided regarding what, if any, new matters amici intended to address in their brief, Respondents would be effectively deprived of an opportunity to incorporate a response to those arguments in their Brief in Opposition by its due date.

II. THE PARTIES HAVE ALREADY ADDRESSED ALL MATTERS RELEVANT TO THE CONSIDERATION OF THE PETITION UNDER RULE 10.1.

This case does not present a question involving a conflict among the Circuits or a decision which is contrary to any Supreme Court precedent;[3] but rather merely presents an issue which has been a settled question of federal labor law for over three decades. The considerations specified in Supreme Court Rule 10.1(a) and (c) have already been addressed by the parties in their briefs. Furthermore, the clear message to counsel conveyed by Rule 37.2 is that the Court does not want to encourage the proliferation of *amicus curiae* briefs prior to the consideration of the writ.[4] Rule 37.2 specifically

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[3] The two Circuit Courts which have addressed the issue reached the same result and both confirmed that there is no conflict with existing Supreme Court precedent. *Burlington Northern Railroad Company v. Brotherhood of Maintenance of Way Employes*, 961 F.2d 86 (5th Cir.), *reh'g en banc denied*, 968 F.2d 18 (5th Cir. 1992); *Louisville & Nashville Railroad Company v. Brown*, 252 F.2d 149, 155 (5th Cir.), *cert. denied*, 356 U.S. 949 (1958); *CSX Transportation, Inc. v. N.J. Marquar, et al.*, No. 91-5689, slip op., —— F.2d ——, 141 LRRM 2785, 2800-2803 (6th Cir. November 13, 1992). As pointed out in those decisions, there are no other Appellate or District Courts in the sixty-six year history of the Railway Labor Act to reach a contrary result.

[4] Indeed, Respondents discussed with the Rail Labor Executives Association (the association of the chief executives of the railway labor organizations), and with the American Federation of Labor the advisability of filing *amicus curiae* briefs in *opposition* to the grant of *certiorari*, in the event that an *amicus curiae* brief was filed in favor of granting the writ. However, Respondents took seriously the admonitions of Rules 37.1 and 37.2. Therefore, since this case involved no conflict among the decisions of the Circuit Courts or with a decision of this Court, and the parties could adequately address the issues relevant to the grant of *certiorari* under Rule 10.1, Respondents concluded that this Court should not be further burdened with briefs. This seemed particularly apropos in a case, such as this, which presents an issue which has been settled for over three decades.

states that when one party withholds consent a motion for leave to file an *amicus* brief is not favored at that stage. This is true even if the *amicus curiae* brief meets the test of Rule 37.1, which, in any event, this *amicus curiae* brief does not.

III. ALTERNATIVELY, IF LEAVE IS GRANTED FOR THE FILING OF THE *AMICUS CURIAE* BRIEF, THE COURT SHOULD NOTE THAT ITS ARGUMENTS ACTUALLY SUPPORT DENIAL OF *CERTIORARI*

In the event that the Court permits the filing of the *amicus curiae* brief, Respondents respectfully request that the Court note that its arguments in certain critical respects actually support Respondents position that *certiorari* should be denied. Amici acknowledged that its members administer literally thousands of collective bargaining agreements with numerous unions and are continually involved in minor disputes over their application. Amici also admit that the issue presented here has not often been considered by the Courts since strikes over minor disputes do not often occur. Amici further acknowledge that on the comparatively few occasions when strikes over minor disputes have occurred,[5] that railroads and airlines have always sought, and the courts have granted, injunctive relief to channel the dispute into the statutory dispute resolution mechanisms of the Railway Labor Act ("RLA"). Amici find no fault with the over sixty years of judicial utilization of injunctive relief to ensure compliance with the RLA procedures by unions, as well as carriers.

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[5] As was the case here, which is characteristic of the few cases in which the issue has arisen, the strike was over a dispute which the union believed was major (in which case self help would be lawful) resulting from a unilateral contract change in violation of § 2 Seventh of the Railway Labor Act (45 U.S.C. § 152 Seventh), but which the District Court later determined was minor.

Amici now argue, however, that Congressional deregulation of the airline and railroad industries will lead, or has lead, to more union-employer controversies which might lead to more strikes. However, no factual basis is submitted to demonstrate that this has been true in the past, even though deregulation in the railroad and airline industries have been in effect for more than a decade. Furthermore, Amici's crystal ball prediction that strikes over minor disputes will be more likely in the future because of the decision below is pure speculation, and there is certainly no factual basis supporting this conclusion. Indeed even if Amici's fears were true, this is a question of labor policy which should be addressed to Congress, and not to this Court.[6] *See "Respondents' Brief in Oppoistion,"* pp. 20-23.

CONCLUSION

Considering that this case involves a question which has been settled for thirty four years, Respondents withheld their consent to the filing of *amicus curiae* briefs in deference to the Court's sentiment expressed in Rule 37.2, that amicus briefs before consideration of the writ are not favored. This is particularly so when, as here, the parties can, and have, addressed the relevant considerations specified in Rule 10.1 (*i.e.* the lack of a conflict in the circuits or with applicable Supreme Court precedent), and the *amicus curiae* brief adds nothing new bearing on those issues.

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[6] Amici's analysis is further flawed since even assuming competitive pressures in the deregulated environment could lead to strikes over wage and other economic disputes, these would necessarily arise only in the context of major disputes over contract formation issues and not in the context of minor disputes over contract interpretation issues.

Respectfully submitted,

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